(14)

No. 87-821-CFX
Status: GRANTED

Title: Pittston Coal Group, et al., Petitioners
v.
James Sebben, et al.

Docketed:
November 20, 1987

Court: United States Court of Appeals
for the Eighth Circuit

Vide:
87-827

Counsel for petitioner: Solomons,Mark E.

Counsel for respondent: Solicitor General, Smith,Paul M.

See also:
87-827
87-1045
87-1065

NOTE* Ext. of time gr. on 9/17/87 to & incl.
11/20/87 by Blackmun, J., cited

Entry	Date	Note	Proceedings and Orders
1	Sep 11 1987		Application for extension of time to file petition and order granting same until November 20, 1987 (Blackmun, September 17, 1987).
2	Nov 20 1987	G	Petition for writ of certiorari filed.
3	Nov 20 1987		Appendix of petitioner Pittston Coal Group, et al. filed.
5	Dec 10 1987		Order extending time to file response to petition until January 22, 1988.
6	Jan 22 1988		Brief amicus curiae of National Coal Association filed.
7	Jan 22 1988		Brief of respondents in opposition filed. VIDED.
8	Jan 22 1988		Brief amici curiae of American Insurance Association, et al. filed. VIDED.
9	Feb 3 1988		DISTRIBUTED. February 19, 1988
10	Feb 22 1988		Petition GRANTED. The case is consolidated with 87-827, and a total of one hour is allotted for oral argument. **********
11	Mar 3 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
14	Mar 17 1988		Order extending time to file brief of petitioner on the merits until May 5, 1988.
12	Mar 21 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
15	Apr 11 1988		Order further extending time to file brief of petitioner on the merits until May 19, 1988.
16	May 5 1988	D	Motion of respondents for divided argument filed.
18	May 19 1988		Brief of petitioner United States filed. VIDED.
19	May 19 1988		Brief of petitioners Pittston Coal Group, et al. filed. VIDED.
20	May 19 1988		Brief amici curiae of Natl. Council on Compensation Insurance, et al. filed. VIDED.
21	May 19 1988		Brief amicus curiae of National Coal Association filed. VIDED.
22	May 19 1988		Record filed.
		*	Certified copy of original record and C. A. proceedings,4 volumes, received.
17	May 23 1988		Motion of respondents for divided argument DENIED.
24	May 31 1988		Order extending time to file brief of respondent on the merits until July 15, 1988.
25	Jul 14 1988		Brief of respondents filed. VIDED.

No. 87-821-CFX

Entry	Date	Note	Proceedings and Orders
26	Jul 15 1988		Set for argument. Monday, October 3, 1988. This case is consolidated with Nos. 87-827 and 87-1095. (1st case) (1 hr.)
27	Jul 15 1988		Brief of respondents Charlie Broyles, et al. filed. VIDED.
31	Jul 15 1988	G	Motion of the Solicitor General for divided argument filed.
28	Jul 20 1988	G	Application (A88-61) filed by Petitioners, for an extension of time within which to file a reply brief, submitted to Justice Blackmun.
29	Jul 25 1988		CIRCULATED.
30	Jul 26 1988		Application (A88-61) granted by Justice Blackmun extending the time to file until August 25, 1988.
32	Aug 9 1988	G	Application (A88-121) filed by the SG, for extension of time within which to file a reply brief, submitted to Justice Blackmun.
33	Aug 11 1988		Application (A88-121) granted by Justice Blackmun extending the time to file until August 25, 1988.
34	Aug 25 1988	X	Reply brief of petitioners Pittston Coal Group, et al. filed. VIDED.
35	Aug 25 1988	X	Reply brief of petitioner United States filed. VIDED.
36	Sep 15 1988		Motion of the Solicitor General for divided argument GRANTED.
37	Oct 3 1988		ARGUED.

87-821

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, BARNES & TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY, PENNSYLVANIA NATIONAL INSURANCE GROUP,

Petitioners,

v.

JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, WILLIAM BROCK, III, SECRETARY UNITED STATES DEPARTMENT OF LABOR, STEVEN BREESKIN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 20, 1987

QUESTIONS PRESENTED

The Eighth Circuit's decision below requires the United States Secretary of Labor to reopen and relitigate at least 94,000, and possibly as many as 155,000, claims for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1982). All of these claims were finally adjudicated, denied and long ago closed, and are now barred by res judicata. The Eighth Circuit held that this drastic remedy is justified because the Secretary of Labor did not adjudicate these black lung cases under entitlement regulations that the Eighth Circuit prefers but which are inapplicable to these cases.

The questions presented are:

1. Does the Eighth Circuit have a legally proper basis under 28 U.S.C. § 1361 to invalidate tens of thousands of final black lung claim adjudications, barred by res judicata, and to require the Secretary of Labor to reopen and readjudicate these cases?
2. Is the Secretary of Labor required by the Black Lung Benefits Act to adopt a Social Security Administration regulation, 20 C.F.R. § 410.490, for determining entitlement in Department of Labor black lung claims?
3. Does the Eighth Circuit have the authority to adopt and promulgate by judicial decree a regulation for the Secretary of Labor, in disregard of the requirements of section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and of 30 U.S.C. § 936(a)?
4. Is the automatic retroactive application of 20 C.F.R. § 410.490 to previously adjudicated and closed claims involving the liability of mine owners consistent with the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

LIST OF PARTIES AND RULE 28.1 STATEMENT

This case was filed in the U.S. District Court for the Southern District of Iowa as a suit for class certification and mandamus. James Sebben, John Cossolotto, Bruno Lenzini and Charles Tonelli were the plaintiffs and purported class representatives in the district court and appellants in the Eighth Circuit. Each plaintiff was an unsuccessful applicant for benefits under the Black Lung Benefits Act ("the Act"). William E. Brock, III, was the Secretary of Labor; Steven Breeskin is an employee of the United States Department of Labor having certain administrative responsibilities in connection with the black lung program. Secretary Brock and Mr. Breeskin were defendants in the district court and appellees in the court of appeals.

In the Eighth Circuit, the Pittston Coal Group, Barnes and Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company and the Pennsylvania National Insurance Group (eollectively "intervenors") sought and were granted leave to intervene as indispensable parties on the side of the federal parties.

Intervenors are the petitioners in this Court and all other parties are respondents.

The Barnes and Tucker Company and the Pennsylvania National Insurance Group are independent entities without parent, subsidiary or other corporate relationships which must be listed under Rule 28.1 of the Rules of the United States Supreme Court. The Pittston Coal Group is a wholly owned subsidiary of the Pittston Companies. The Island Creek Coal Company is a wholly owned subsidiary of the Occidental Petroleum Corporation. The Consolidation Coal Company is a wholly owned subsidiary of the E.I. du Pont de Nemours & Company. The Old Republic Insurance Company is a wholly owned subsidiary of the Old Republic International Corporation.

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IN THE

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OCTOBER TERM, 1987

PITTSTON COAL GROUP, BARNES & TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY, PENNSYLVANIA NATIONAL INSURANCE GROUP,

Petitioners,

v.

JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, WILLIAM BROCK, III, SECRETARY UNITED STATES DEPARTMENT OF LABOR, STEVEN BREESKIN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed in this proceeding on March 25, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 815 F.2d 475 (Pet. App. 1a). The Order of the Eighth Circuit denying the Government's Petition for Rehearing En Banc is unreported (Pet. App. 17a). The Orders granting intervenors' motions to intervene are unreported (Pet. App. 19a, 20a). The Order denying intervenors' Petition for Rehearing and Suggestion for Rehearing En Banc is unreported (Pet. App. 18a). The district court's Order granting defendants' Motion to Dismiss for lack of subject matter jurisdiction is unreported (Pet. App. 21a).

JURISDICTION

The decision of the Court of Appeals was filed on March 25, 1987. Timely petitions for rehearing filed by the Government and on behalf of intervenors were denied on June 25, 1987 (Pet. App. 17a) and July 24, 1987 (Pet. App. 18a), respectively. On September 17, 1987, Justice Blackmun signed Orders extending the time for both the Government and intervenors to file a petition for a writ of certiorari to and including November 20, 1987 (Pet. App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States (Pet. App. 25a);
2. Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982) (Pet. App. 25a);
3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1982) (Pet. App. 27a);
4. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1982) (Pet. App. 28a);
5. Section 19 of the Longshore Act, 33 U.S.C. § 919 (1982) (Pet. App. 29a);
6. Section 21 of the Longshore Act, 33 U.S.C. § 921 (1982) (Pet. App. 31a);
7. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1987) (Pet. App. 34a); and
8. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1987) (Pet. App. 37a).

STATEMENT OF THE CASE

A. Introduction

This case is one of enormous economic significance to the U.S. coal industry, its commercial insurers and all related sectors of the national economy. The decision below, if enforced, will burden industry with as much as $13.6 billion in unanticipated and unfunded liability for the federal black lung benefits program. The decision would require the readjudication of at least 94,000 previously denied and closed claims under eligibility standards that are inappropriate for adversary claims litigation and that effectively deprive mine owners of the right to defend these claims. Remarkably, mine owners and their insurers have been all but excluded from the litigation of the issues presented here, which so dramatically affects their interests. This case is also of great significance to the Department of Labor, which is responsible for the administration and processing of the affected claims, and to the U.S. Treasury, which will be required to borrow the money to pay these claims until the coal industry is able to do so, if that day ever comes.

B. Statutory Background

The Black Lung Benefits Act,[1] 30 U.S.C. §§ 901-945 (1982) ("the Act"), establishes a program to provide benefits on account of total disability or death due to coal mine employment-related pneumoconiosis ("black lung" disease), 30 U.S.C. § 901(a). Claims for benefits filed between December 30, 1969 and June 30, 1973 were processed by the Social Security Administration ("SSA") under procedures set forth in the Social Security Act,

1. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969), *as amended by* the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981), and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986).

42 U.S.C. §§ 404-408 (1982), *incorporated by reference* into the Black Lung Benefits Act at 30 U.S.C. § 923(b). Benefits awarded for these claims, termed "Part B" claims, were paid from the U.S. Treasury. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976). Claims filed after December 31, 1973[2] are called "Part C" claims. *Id.* Part C claims are filed with the Secretary of Labor ("Secretary") and adjudicated under the adversarial litigation procedures set forth in sections 19 and 21 of the Longshore Act, 33 U.S.C. §§ 919, 921, incorporated into 30 U.S.C. § 932(a).[3] Benefits awarded under Part C are paid directly by a mine owner or its insurer, 30 U.S.C. §§ 932(c), 933, or by a coal industry-financed fund administered by the Secretary of Labor, 30 U.S.C. § 934.[4] By congressional design, the Part B program was intended to be a special but temporary, and exceptionally generous, remedial measure for persons who were unable to obtain redress under traditional state workers' compensation laws.[5] Part C was intended to be a workers' compensation program.[6] *See* 30 U.S.C. § 931; *see also Strike* v. *Director, Office of*

2. A six-month transition period from July 1 to December 31, 1973 required the filing of a Part B claim with SSA which was then converted to a Part C claim as of January 1, 1974. 30 U.S.C. § 925.

3. Trials in Part C claims are subject to the on-the-record hearing provisions of the Administrative Procedure Act, 5 U.S.C. § 554 (1982). 33 U.S.C. § 919(d). Appeals in Part C claims are taken first to the Department of Labor's Benefits Review Board and then to a designated U.S. court of appeals. A federal district court may enforce compliance with final orders, but otherwise has no jurisdiction to act in black lung claims. 33 U.S.C. § 921, *incorporated into* 30 U.S.C. § 932(a). *See Louisville & Nashville R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

4. This fund is financed by a producer's tax on coal, 26 U.S.C. §§ 4121, 9501 (1982). The fund pays benefits if the miner last worked prior to January 1, 1970 or if there is no mine operator liable for the payment of benefits. 30 U.S.C. §§ 932(c), 934(a) (1982).

5. *See* H.R. Rep. No. 460, 92d Cong., 1st Sess. 5-7 (1971), *reprinted in* House Comm. on Labor and Public Welfare, Subcomm. on Labor, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969, as Amended Through 1974*, at 1725, 1729-31 (1975) (discussing the purposes and intent of the Part B program).

6. Under Part C, the claimant is required to file a state claim if the state workers' compensation program in the miner's state provides adequate black lung benefits. 30 U.S.C. § 931.

Workers' Compensation Programs, 817 F.2d 395, 397 (7th Cir. 1987); S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (noting that it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations").

In both the Part B and Part C programs, a variety of statutory and regulatory presumptions aid claimants in proving entitlement. Following enactment of the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.), SSA promulgated an eligibility regulation called the "interim presumption." 20 C.F.R. § 410.490 (1987) (Pet. App. 34a). The presumption is an extremely powerful and liberal vehicle designed to effectuate the purpose of the SSA black lung program. It could not be applied in Part C claims.[7]

In 1978, Congress authorized the Secretary of Labor to write his own black lung eligibility rules,[8] and amended the Act in several other important respects. Both SSA and the Department of Labor ("Labor") were directed to review all then-pending and denied claims under revised statutory standards. 30 U.S.C. § 945. Part C claims were to be reviewed under the new Labor regulations. *See* 30 U.S.C. § 902(f)(1). The 1978 amendments provided, however, that the rules to be applied under Part C to reviewed claims and certain new claims "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2).

7. The provision is entitled "Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974."

8. Before 1978, only the Secretary of Health, Education and Welfare (now Health and Human Services) had statutory authority to write eligibility rules. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 401, 411, 83 Stat. 793 (1969). The Secretary of Labor had no regulatory authority in this regard. HEW refused to apply the interim presumption to Department of Labor claims, believing that it would be constitutionally impermissible to apply the interim rules in claims involving mine owners. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, at 508, 522-26 (Comm. Print 1977) [hereinafter *1977 Legislative History*].

In response to these amendments, the Secretary of Labor promulgated a Part C version of the interim presumption at 20 C.F.R. § 727.203 (1987) (Pet. App. 37a). The Part B and Part C presumptions are similar, but not identical.[9] The Labor presumption *cannot* be invoked unless the miner was engaged in coal mine work for at least ten years. *Id.* § 727.203(a). The SSA presumption requires fifteen years of mine employment for invocation on the basis of ventilatory tests, *see* 20 C.F.R. § 410.490(b)(1)(ii) (1987). Invocation based upon an abnormal chest x-ray, biopsy or autopsy is possible if the miner worked for ten years *or*, absent ten years employment, if the miner is able to prove that the abnormal x-ray, biopsy or autopsy was caused by coal dust exposure,[10] *see id.* § 410.490(b)(2). The Labor rule is in some respects more favorable to Part C claimants because it permits invocation on grounds not available to Part B claimants. *See id.* § 727.203(a)(3)-(5).[11]

Rebuttal differences in the two programs are far more dramatic. The Labor/Part C presumption may be rebutted by direct medical proof that the miner neither died from nor was totally disabled by black lung disease. *Id.* § 727.203(b). The SSA/Part B presumption cannot be rebutted by medical evidence; it is not clear that it can be rebutted at all unless the miner is still working. *Id.* § 410.490(c). *Compare id. with id.* § 727.203(b); *see Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1184 (7th Cir. 1987); Comptroller General of the U.S., *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47 (1977).

9. There is a substantial body of legislative history indicating that identical provisions were neither intended nor contemplated. *See, e.g.*, H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309, 325; 124 Cong. Rec. 2333, 3431 (1978) (statements of Sen. Javits and Rep. Simon), *reprinted in 1977 Legislative History*, *supra* note 8, at 909, 929.

10. Although the SSA regulation clearly presents the alternatives noted, it is not clear that, as a mater of agency practice, SSA permitted invocation of its presumption by x-ray evidence absent ten years of coal mine employment. *See, e.g., Dickson* v. *Califano*, 590 F.2d 616, 618-21 (6th Cir. 1978).

11. A claimant's failure to invoke the presumption does not result in an automatic denial of the claim. Any claimant may obtain benefits by providing direct proof of total disability or death due to black lung disease.

After promulgation of the 1978 rules, the Secretary of Labor applied the new Part C interim presumption in approximately 424,000 claims. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 186 (1981) [hereinafter *1981 Oversight Hearings*].

C. Background of This Litigation

In 1982, the Third Circuit held that the Part C rule is more restrictive than the Part B rule because it precludes invocation by x-ray, biopsy or autopsy evidence absent ten years of mine employment. Because the Part B rule could be invoked by a miner with fewer than ten years of employment, the court concluded that the Part C rule violated 30 U.S.C. § 902(f)(2). *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 30 (3d Cir. 1982). The *Halon* court directed Labor to apply the Part B presumption in a Part C/Labor claim. *Id.* at 31. On rehearing, two members of the panel reaffirmed the original decision invalidating the Labor regulation. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983). In a strong dissent, Judge Weis surveyed the Act's extensive legislative record and declared that the Department of Labor's regulation was valid because Congress did not intend to preclude Labor from imposing a ten-year requirement. *Id.* at 25-30.

The *Halon* rule and 20 C.F.R. § 410.490 have been applied by the Labor Department in active or pending cases arising within the jurisdiction of the Third Circuit.

In 1985, the Eighth Circuit adopted the Third Circuit's holding and rationale in *Halon*. *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966, 968 (8th Cir. 1985). After *Coughlan*, section 410.490 has been applied in all pending

cases within the jurisdiction of the Eighth Circuit. Neither *Halon* nor *Coughlan* directed the Secretary to apply section 410.490 retroactively to previously closed cases or to apply it in cases arising in other circuits.

D. Background of This Case

Shortly after the *Coughlan* decision, four black lung claimants filed suit in the U.S. District Court for the Southern District of Iowa seeking nationwide class certification and a writ of mandamus under 28 U.S.C. §§ 1361, 1651 (1982) to compel the Secretary of Labor to reopen all previously denied and closed Part C cases and readjudicate them under section 410.490. On February 6, 1986, the district court granted the Secretary's motion to dismiss because (1) *Coughlan* imposed no duty on the Secretary to readjudicate previously closed cases under section 410.490, and (2) the district court had no subject matter jurisdiction to consider black lung claims in which the plaintiffs had failed to exhaust administrative remedies. (Pet. App. 22a.)

On March 25, 1987, the Eighth Circuit reversed, holding that the Secretary had a clear nondiscretionary duty to apply section 410.490 to Part C claims and had failed to do so in many previously denied and closed cases (Pet. App. 11a). Further, analogizing this case to *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986), the court held that statutory finality requirements could be waived by the court under appropriate circumstances and that the Secretary's failure to follow Congress's mandate to apply section 410.490 justified a waiver in this case (Pet. App. 13a, 15a-16a).

The Eighth Circuit directed the district court to certify the class, which was to comprise all previously denied claimants who had originally filed for benefits between December 30, 1969 and April 1, 1980 and who were denied adjudication under section 410.490 because they had not worked for ten years in the coal

mines[12] (Pet. App. 16a). The Secretary was instructed to reopen and individually readjudicate under section 410.490 each claim within the class.

No mine operator or insurer was a party to the suit. Mine owners' counsel were notified informally of the Eighth Circuit's decision by Government counsel. Two groups of owners and insurers filed separate motions to intervene as indispensable parties[13] and for leave to file a petition for rehearing; these motions were granted. Intervenors argued, among other things, that *Coughlan* was wrongly decided and that the views of the real parties in interest with respect to this matter had never been considered. The Government has obtained a stay of the judgment of the Eighth Circuit pending the filing and disposition of petitions for certiorari.

REASONS FOR GRANTING THE WRIT

By requiring the retrial of tens of thousands of closed claims under section 410.490, the decision of the Eighth Circuit will dramatically and permanently upset the fiscal and administrative stability of the black lung program. Through the course of amendments enacted in 1978, 1981 and 1985, Congress and the Department of Labor have made a substantial effort to develop a program which is uniquely generous to claimants but still affordable and fair to the coal industry. The Eighth Circuit's decision strips these efforts of meaning and purpose. The court's errors are many, and all are serious.

The Eighth Circuit's decision conflicts directly with the decisions of other circuits in two respects and conflicts in principle with decisions of this Court. Its mandate is a matter of staggering economic significance to mine owners, and deprives them of the right to litigate questionable and non-meritorious claims.

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12. An additional criterion is that the claimant have submitted at least one positive chest x-ray. Virtually all claimants have done so or would be able to do so if given the opportunity.

13. The motion filed by the Pittston Coal Group, *et al.*, was filed on behalf of movants and all others similarly situated.

I.
DIRECT CONFLICTS AMONG THE CIRCUITS ARE PRESENTED

The underlying substantive question presented is whether the Secretary of Labor was required to adopt all of the provisions of the SSA interim presumption when the Part C interim presumption was promulgated. A finding that the Secretary was not required to do so, and that 20 C.F.R. § 727.203[14] is a valid rule—even though the presumption it contains may not be invoked by a short-term coal miner and even though it is fully rebuttable—disposes of this case entirely.[15]

The circuits do not agree on whether, or to what extent, the SSA presumption applies in Department of Labor claims. The

14. On October 14, 1987, this Court heard oral argument in a case involving the standard of proof imposed for invocation of the Labor interim presumption, 20 C.F.R. § 727.203. *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, No. 86-327, *cert. granted*, 107 S. Ct. 871 (1987). The disposition in *Mullins* will affect the impact of the outcome here, but will not resolve the questions presented here.

15. The Questions Presented, *supra*, p. i, ask this Court to determine the validity of the Secretary's regulation. The regulation is valid. Its validity is presumed. *Boske* v. *Comingore*, 177 U.S. 459, 470 (1900). That presumption stands unrebutted. The Act confers broad authority on the Secretary to write eligibility rules, 30 U.S.C. § 902(f)(1) (1982). The Secretary interpreted the Act to permit promulgation of a regulatory presumption that (1) requires ten years or more of employment for invocation, and (2) is fully rebuttable by relevant evidence. The Secretary's interpretation of the Act in the rule at 20 C.F.R. § 727.203 is entitled to substantial judicial deference in the setting presented. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). All traditional rules of deference in this controversial and technically complex area lend weight to the Secretary's views. *See United States* v. *Larionoff*, 431 U.S. 862, 872 (1977); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134 & n.25 (1977). The Secretary's rule draws additional support from the legislative history of the Act. *See Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 25-30 (Weis, J., dissenting). Any ambiguity in the legislative history does not detract from the validity of the rule. *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). The fact that Congress has twice implicitly ratified the rule also carries considerable weight. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). Finally, and perhaps most compelling, the Secretary was obligated to write a rule which preserves fairness in adversary litigation. This factor has been completely ignored by each of the courts that have invalidated the Secretary's rule.

Eighth Circuit has held that the invocation and rebuttal provisions of section 410.490 must be applied in Part C claims, concluding that "the ALJ and BRB erred in failing to evaluate the evidence . . . under the criteria contained in 20 C.F.R. § 410.490." *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d at 968. The Third Circuit has directed application of the invocation portion of the SSA rule if the miner had fewer than ten years of mine employment. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 24-25. The court recently extended this holding to encompass the rebuttal provisions of section 410.490(c) as well. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922, 924 (3d Cir. 1987).

The Seventh Circuit has specifically rejected the holdings of the Third and Eighth Circuits, stating:

> We cannot agree with the conclusion reached by these two courts. . . .
>
> [W]e hold that the Secretary of Labor was not obligated by [30 U.S.C.] § 902(f)(2) to incorporate the provision in § 410.490 . . . . We appreciate that the Part C interim presumption may yield different results than the Part B presumption for miners with fewer than ten years of coal mine employment. From their inception in 1969, however, the Part B and Part C programs were intended to be separate and distinct.

Strike v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 400, 405 (7th Cir. 1987).[16]

The Sixth Circuit has followed the *Halon* rationale, rejecting the Secretary's rule and applying the SSA rule to Labor claims. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 142-43 (6th Cir. 1987). In a dissent, Judge Guy

16. Because of the conflict created by this decision, the opinion was circulated in accordance with Seventh Circuit Rule 40(f). No judge favored rehearing en banc. 817 F.2d at 396. The Seventh Circuit's decision was issued on April 16, 1987. On September 29, 1987, the claimant moved to vacate the court's decision on the grounds that the original notice of appeal filed with the Seventh Circuit was untimely; this motion is pending.

agreed with the dissenting rationale of Judge Weis in *Halon*, and would have upheld the validity of the Labor rule. More recently, however, the Sixth Circuit has indicated that it will not apply the Part B rebuttal provisions to Part C claims. *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, ___ n.2 (6th Cir. 1987); *see also Kyle*, 819 F.2d at 143-44.

Finally, the Fourth Circuit has held that both the invocation and rebuttal provisions of the SSA rules apply to Labor claims. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987). In an apparent departure from the arguably more limited holdings of the Third, Sixth and Eighth Circuits, the Fourth Circuit's decision in *Broyles* indicates that the SSA rule must be applied in all Labor claims if it produces a more favorable result for the claimant. *Id.*

Apart from the section 410.490 controversy, the Eighth Circuit's decision in the case at hand presents another direct split in authority among the circuits. The court held that a claimant's failure to timely pursue administrative remedies does not deprive the court of jurisdiction and that the Black Lung Act's time limitations may be waived for cause.

All other circuits to address these issues have held that the Black Lung Act's time limitations are jurisdictionally based and may not be waived for any reason.[17] Further, the circuits have uniformly precluded claim litigants from seeking relief outside the exclusive statutory scheme provided by the Act. *Louisville & Nashville R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Compensation Dep't of Dist. Five* v. *Marshall*, 667 F.2d 336, 340 (3d Cir. 1981). The Eighth Circuit has departed significantly from longstanding circuit court

17. *See Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 217 (7th Cir. 1986); *Midland Ins. Co.* v. *Adam*, 781 F.2d 526, 528 (6th Cir. 1985); *see also Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Wellman* v. *Director, Officer of Workers' Compensation Programs*, 706 F.2d 191, 193 (6th Cir. 1983); *Insurance Co. of North America* v. *Gee*, 702 F.2d 411, 414 (2d Cir. 1983) *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 43-44 (2d Cir. 1976), *aff'd on other grounds sub nom. Northwest Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977).

law by excusing the plaintiffs here from their obligation to exhaust administrative remedies and by opening the doors of the district courts to them.

The supervisory powers of this Court are urgently required to restore uniformity among the circuits in black lung claims litigation.

II.
THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND RAISES A VARIETY OF IMPORTANT QUESTIONS CONCERNING THE POWERS OF COURTS AND AGENCIES AND THE FUNDAMENTAL RIGHTS OF CLAIM DEFENDANTS

A. Mandamus is Not a Proper Remedy

Under the decisions of this Court, a writ of mandamus may not issue to compel agency action "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised." *United States ex rel. Chicago Great W. R. Co.* v. *ICC*, 294 U.S. 50, 60 (1935). This remedy is restricted "in the main, to situations where ministerial duties of a nondiscretionary nature are involved. . . . [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958). These fundamental rules have not changed. *Heckler* v. *Ringer*, 466 U.S. 602, 616-617 (1984).

Here, the Act provides:

> The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under Part B of this subchapter, and by regulations of the Secretary of Labor for claims under Part C . . . except that . . . [c]riteria applied by the Secretary of Labor [in the cases at issue here] shall not be more restrictive than the criteria applicable to [certain Part B claims].

30 U.S.C. § 902(f)(1), (2) (1982). In light of certain legislative statements and other factors, including public proceedings, the Secretary reads the terms "total disability" and "criteria" in section 902(f) to require the promulgation of some, but not all, of SSA's section 410.490 rule. *See Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d at 400-04; *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 25-30 (Weis, J., dissenting). This classic exercise of discretion by the Department of Labor is plainly not subject to the mandamus powers of the courts. The Eighth Circuit's holding to the contrary defies the decisions of this Court.[18]

B. No Court May Promulgate a Substantive Rule for an Agency

Section 410.490 is not a Labor Department rule. It was promulgated by SSA for application in SSA claims only. The only interim presumption applicable to Labor claims is 20 C.F.R. § 727.203, which the Secretary of Labor promulgated in response to its mandate to write black lung eligibility criteria, *see* 30 U.S.C. § 902(f)(1) (1982).

The decisions of this Court make clear that, while courts may review the validity of agency rules, they may not take the additional step of rewriting a rule or dictating that an alternative rule must apply. *See Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). For a court to promulgate such rules "runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 545 (1978) (citations omitted).

The Black Lung Act specifies that the Labor Secretary's rules "shall be issued in conformity with section 553 of Title 5" of the

18. It is doubtful whether any agency regulator has a nondiscretionary duty to promulgate a substantive rule applicable in hundreds of thousands of matters according to a court's prescription. Moreover, a litigant's failure to exhaust administrative remedies precludes the exercise of mandamus in a collateral proceeding. *Heckler* v. *Ringer*, 466 U.S. at 616.

United States Code. 30 U.S.C. § 936(a) (1982). The Eighth Circuit not only has written a substantive new regulation for Part C claims in contravention of the decisions of this Court, but also has totally disregarded Congress's mandate that APA procedures be followed.

C. The Court Below Clearly Erred in Reopening Thousands of Cases Barred by Res Judicata

These cases cannot be reopened in a collateral proceeding for two reasons: (1) Longshore Act remedies are exclusive and do not permit access to alternative avenues of relief; and (2)their relitigation is barred by the rule of res judicata.

The statutory procedures for the adjudication of black lung claims are complete, comprehensive and exclusive. The Longshore Act provides that "[p]roceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, *shall not be instituted* otherwise than as provided in [33 U.S.C. §§ 918 and 921]." 33 U.S.C. § 921(e) (1982) (emphasis added). *See also id.* §§ 919, 921 (establishing claims adjudication procedures), *incorporated by reference* into the Black Lung Act at 30 U.S.C. § 932(a) (1982). This language divests both the district and circuit courts of collateral jurisdiction to fashion alternative avenues of relief for litigants who have been unsuccessful in their pursuit of the exclusive remedies designated by Congress. *See Whitney Nat'l Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S.411, 420 (1965); *Crowell* v. *Benson*, 285 U.S. 22, 46 (1932); *see also* cases cited *supra* p. 12 & n.17.

Each claim subject to reopening by the decision below has been adjudicated and denied. These denials are final, and the relitigation of their merits is barred. The rule of res judicata is properly applied to administrative decisions of agencies acting in a judicial capacity. *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3226-27 (1986); *United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 421-22 (1966). Exceptions to this rule may not be fashioned to further a court's view of proper "public policy" or

"simple justice." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981). "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'" *Id.* at 401-02 (citation omitted).

The Eighth Circuit had no valid reason to simply cast aside tens of thousands of final agency decisions,[19] nor to mandate the retroactive application of section 410.490 to these cases.

Claimants clearly have no constitutional right to benefit from section 410.490.[20] Application of this rule to Part C claims is merely judge-made law that has evolved through the course of litigation and interpretation of the statute. The interpretation itself is not at all uniformly accepted by the courts that have considered it. The claimants who would compose the class did not exhaust their administrative remedies, and their cases are closed. In this setting, a fair reading of the decisions of this Court noted herein prohibits the reopening and relitigation of the tens of thousands of cases, by writ of mandamus or otherwise. *See Heckler* v. *Ringer*, 466 U.S. at 616; *see also Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

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19. The court below relies exclusively on *Bowen* v. *City of New York*, 106 S. Ct. 2202 (1986), for dispensing with res judicata. This holding is inapposite for two reasons. First, it draws authority solely from provisions of the Social Security Act which do not apply in Part C black lung claims. Further, *Bowen* was an exceptional case in which retroactive application was necessary to remedy the significant adverse impact of an SSA policy which was deliberately hidden from the affected population of claimants. *Id.* at 2230-31. In *Bowen*, the persons affected could not have asserted their rights, not knowing that their rights were in jeopardy. In the instant case, the Secretary's regulation was published in the *Federal Register* and applied openly in all of the affected black lung cases. If a claimant found the rule legally objectionable, there was more than ample opportunity to challenge it in the course of ordinary claim proceedings. *See e.g., Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. (MB) 1-125 (Ben. Rev. Bd. 1981).

20. Any claimant may obtain benefits on direct proof of eligibility. Here, the claimants, whose direct proof failed to establish entitlement, seek the burden of proof advantage of section 410.490. In civil litigation, the allocation of proof burdens is "not an issue of federal constitutional moment." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1986).

D. The Eighth Circuit's Decision Raises Legitimate Due Process Concerns

Legitimate due process concerns arise from the Eighth Circuit's decision requiring application of a rule of evidence, section 410.490, which was neither designed nor intended for use in true adversarial litigation. As a practical matter, section 410.490 does not contemplate either the presentation or consideration of defensive evidence. As a legal matter, it does not permit the adjudicator to consider a substantial portion of the defensive evidence which can be produced by a mine operator. *See Sulyma* v. *Director, Office of Workers' Compensation Program*, 827 F.2d at 924; *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329-30; Cook v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1184. When this rule is applied, evidence that is clearly relevant to whether the miner has pneumoconiosis or is disabled by the disease becomes completely irrelevant. A miner who is not working or is unable to work, for whatever reason, is almost guaranteed black lung benefits, whether he worked in coal mining for one year or for fifty. *Id.; see also Adkins* v. *United States Dep't of Labor*, 824 F.2d 287, 289-90 (4th Cir. 1987); *Roberts* v. *Benefits Review Bd.*, 822 F.2d 636 (6th Cir. 1987); Sykes v. *Director, Office of Workers' Compensation Program*, 812 F.2d 890, 894 (4th Cir. 1987).

Further, the ten-year rule for invocation of a rebuttable presumption is justified by congressional findings; a rule that abolishes the ten-year requirement is not.[21] *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 29. Use of the section 410.490 presumption is particularly troubling because benefits are awarded to claimants on the basis of evidence which, according to fairly uniform testimony provided to Congress, often proves nothing at all. *See Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 26-28 (Weis, J., dissenting); *see also*

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21. In a study published by Congress, the National Institute of Occupational Safety and Health reported that 99.3% of miners with fewer than ten years of exposure showed no evidence of black lung disease. *1981 Oversight Hearings*, *supra* p. 7, at 32 (attachment to statement of Dr. J. Donald Millar, Director, National Institute for Occupational Safety and Health).

Comptroller General of the U.S., *Report To The Congress: Legislation Allows Black Lung Benefits To Be Awarded Without Adequate Evidence Of Disability* 8 (1980) (reporting "in 88.5 percent of the cases [awarded under the SSA rule], medical evidence was not adequate to establish disability or death from black lung").

The Eighth Circuit's interpretation oversteps the boundaries of due process by compelling a result that makes an operator's rights to defend even non-meritorious cases a sham. A right to present a party's case must have some meaning. *Brock* v. *Roadway Express, Inc.*, 107 S. Ct. 1740, 1749 (1987); *Landon* v. *Plasencia*, 459 U.S. 21, 36 (1982). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). A presumption which is a purely arbitrary mandate is not compatible with due process of law. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 28.

Under the Eighth Circuit's interpretation of the Act, mine owners retain the right to a hearing, and may appear to present their side of the case, but what they say and the evidence they present matter hardly at all. The novel due process question presented is significant.

III.

THE COST OF THE DECISION BELOW WILL BE CATASTROPHIC FOR THE COAL AND INSURANCE INDUSTRIES

All benefits paid under Part C are paid directly or indirectly by mine owners and their insurers. 30 U.S.C. §§ 932(a), 933, 934 (1982). The Government estimates that the decision will require 94,000 retrials. Motion to Stay Issuance of Mandate at 5-6. Depending upon certain factors, the number could exceed 155,000. *See 1981 Oversight Hearings, supra* p. 7, at 7, 102, 186 (prepared statements of Morton E. Henig, U.S. General Accounting Office; Sam Church, Jr., President, United Mine

Workers of America; Charles Coakley, Counsel, American Insurance Association).

The average cost of a single black lung claim has been estimated by the Department of Labor to range from approximately $118,000 to more than $186,000. U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981). Insurance industry actuaries estimate that the cost of the decision below in indemnity benefits alone will be from $4.7 billion to $13.6 billion.[22] Added to the cost of indemnity benefits are litigation expenses of from $5,000 to $10,000 per claim and the administrative and debt service costs incurred by the Department of Labor, all of which mine owners also must pay. 30 U.S.C. § 934(a)(4), (5) (1982). Additional billions in liability are implicated by the application of section 410.490 in active cases. The Benefits Review Board has already remanded hundreds of active cases for retrial under section 410.490.

Congress has devoted substantial effort to making the black lung program affordable. The Eighth Circuit's observation that it was compelled to reopen all closed cases so that "[i]t should not be necessary for Congress to pass a third act requiring the Secretary to reconsider these claims" (Pet. App. 10a) misinterprets Congress's purposes. Congress had opportunities in 1978, 1981 and 1985 to address the very issues that concern the Eighth Circuit; each time, it has refused to do so.[23]

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22. The lower estimate applies if section 410.490 is applied according to the Sixth Circuit's formula, which limits applicability to claims involving ten or fewer years of mine work and does not apply the section 410.490 rebuttal provisions. The higher estimate applies if the Third or Fourth Circuit's approach is used and section 410.490 is applied in *all* cases with respect to both invocation and rebuttal. The Eighth Circuit's approach is more closely allied with those of the Third and Fourth Circuits.

23. *See* H.R. Rep. No. 241, 99th Cong., 2d Sess. 75-76, *reprinted in* 1986 U.S. Code Cong. & Admin. News, 653-54; House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 16-30 (Comm. Print 1981); S. Rep. No. 336, 95th Cong., 1st Sess. 8-9 (1977), *reprinted in 1977 Legislative History*, *supra* n.8, at 986, 993-94; Letter from Rep. Carl D. Perkins, Rep. John H. Dent and Rep. Paul Simon to Robert B. Dorsey (May 25, 1978) (Pet. App 41a).

The enormous liabilities that will flow from the Eighth Circuit's decision are intolerable to the affected industries and inconsistent with Congressional intent. These additional liabilities would arise from a decision that (1)improperly strips the Secretary of Labor of his justified exercise of discretion in the publication of eligibility regulations; (2)erroneously finds that the process of writing complex eligibility regulations is a proper subject for mandamus jurisdiction; (3) impermissibly rewrites an agency rule; (4) ignores time-honored principles of res judicata; (5) applies, without any adequate precedent, a new judge made rule to long since closed cases; and (6) deprives claim defendants of any reasonable rights to be heard.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ MARK E. SOLOMONS

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87-821

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, BARNES & TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY, PENNSYLVANIA NATIONAL INSURANCE GROUP,

Petitioners,

v.

JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, WILLIAM BROCK, III, SECRETARY UNITED STATES DEPARTMENT OF LABOR, STEVEN BREESKIN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 20, 1987

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315 James Sebben; John Cossolotto; Bruno Lenzini; and Charles Tonelli, on behalf of themselves and all others similarly situated, *Appellants,* v. William E. Brock, III; United States Secretary of Labor; United States Department of Labor; and Steven Breeskin, Acting Deputy Commissioner, U.S. Department of Labor, Division of Coal Mine Workers' Compensation, *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: October 16, 1986
Filed: March 25, 1987

Before HEANEY and ROSS, Circuit Judges, and LARSON,* Senior District Judge.

HEANEY, Circuit Judge.

The appellants, James Sebben, John Cossolotto, and Charles Tonelli, are claimants and representatives of a group of claimants seeking benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-42 (1982 & Supp. III 1985) (codified as amended in 1972, 1978, 1981 and 1984) (the BLBA). In the district court, they sought certification of a class and a writ of mandamus under 28 U.S.C. § 1361 to compel the Department of Labor to consider or reconsider the claims of the proposed class under 30 U.S.C. § 902(f)(2) (1982) as interpreted by *Coughlan* v. *Director, Office of Workers' Compensation Programs,* 757 F.2d 966 (8th Cir. 1985). The district court denied the application for the writ and dismissed the claim without certifying the class.[1] It held that *Coughlan* was not applicable to claims previously denied by the Department of Labor and not timely pursued on appeal. It further held that it was without jurisdiction because the BLBA conferred exclusive jurisdiction upon the circuit courts of appeals to review administrative decisions under the BLBA.

On appeal, the Secretary of Labor (Secretary) concedes that the proper standard for review of the appellants' BLBA claims is articulated in *Coughlan.* The Secretary has also agreed to apply *Coughlan* in all pending cases in the Eighth Circuit.

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

1. Because the district court never certified the class, we refer to the group of claimants who intended to join it as the "class," with the recognition that it is not a class within the meaning of Fed. R. Civ. P. 23. *See Baxter* v. *Palmigiano,* 425 U.S. 308, 310-11 n.1 (1976).

On remand, the district court shall define the class and determine which appellants could appropriately represent it. If some or all cannot, application may be made to the district court for designation of the appropriate class representatives. We note that one of the appellants named in this appeal, Bruno Lenzini, has been awarded benefits under the BLBA. *Lenzini* v. *Director, Officer of Workers' Compensation Programs,* No. 86-1001, slip op. (8th Cir. May 8, 1986). Lenzini therefore would not be an appropriate class representative.

In *Coughlan,* this Court considered claims of miners and their survivors who argued that the miners had become totally disabled due to black lung disease (pneumoconiosis) under the BLBA. The presence of pneumoconiosis in *Coughlan* was proved by a positive chest x-ray of the miner. We held that a positive x-ray was sufficient to create a rebuttable presumption of pneumoconiosis under 20 C.F.R. § 410.490 (1986) (known as the "interim" regulation). We reasoned that even though the presumption of pneumoconiosis in section 410.490 originally only applied to claims made prior to July 1, 1973, a 1977 amendment to the BLBA, 30 U.S.C. § 902(f)(2) (1982), revived the presumption and made it applicable to the claims presented. *Coughlan,* 757 F.2d at 967-68.

The appellants allege that they and the "class" all filed claims on or before March 31, 1980, thus entitling them to the section 410.490 presumption accorded to the claimants in *Coughlan.*[2] They further allege that they all submitted positive x-rays as evidence of total disability but were not afforded the section 410.490 presumption of disability mandated by *Coughlan.*

The Secretary contends that, even assuming the substantive validity of the "class" members' claims, the district court properly dismissed the action because: (1) the district court lacked jurisdiction; (2) the appellants and the class members failed to exhaust their administrative remedies; and (3) many of the potential class members failed to file timely administrative and judicial appeals and thus are jurisdictionally barred from seeking review at this time.

I. JURISDICTION OF THE DISTRICT COURT.

At the outset, we accept the proposition that where Congress establishes a special statutory review procedure for administrative actions, that procedure is generally the exclusive means of review for those actions. *Louisville and Nashville R. Co.* v.

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2. In order for the claimants to be accorded the presumption contained in section 410.490 (b), 30 U.S.C. § 902 (f)(2) required that they file a claim on or before the effective date of 20 C.F.R. Part 718 (1986), which would mean before April 1, 1980. *See* 20 C.F.R. § 718.1(b).

Donovan, 713 F.2d 1243, 1246 (6th Cir. 1983); *see also Heckler* v. *Ringer*, 466 U.S. 602, 616-17 (1984) (refusing to consider whether mandamus jurisdiction is barred by 42 U.S.C. § 405(h) of the Social Security Act). Furthermore, the unavailability of simultaneous review of administrative actions in both the district court and the circuit court of appeals is strongly presumed. *Louisville & Nashville R. Co.*, 713 F.2d at 1246. In "narrow circumstances," however, "some residuum of federal question subject matter jurisdiction may exist in the district court, although apparently otherwise precluded by a comprehensive statutory review scheme." *Id.* at 1246. That residuum may permit district courts in the proper circumstances to exercise mandamus jurisdiction over the agency under the BLBA. *Id.*

Before a district court can issue a writ of mandamus under section 1361 and exercise jurisdiction outside of that provided in the BLBA, the claimant must show either "patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review." *Id.* (citing *Nader* v. *Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972)). In addition, the claimant must show that the agency, over which jurisdiction is exercised, has a clear nondiscretionary duty to act. *Heckler* v. *Ringer*, 466 U.S. at 616-17.

The circumstances of this case reveal that review of claims under the BLBA cannot remedy the infringement on the substantial rights of the "class" members. The Department of Labor has agreed to follow *Coughlan* in all cases pending in the Eighth Circuit after the date of that decision. The agency, however, refuses to reopen the claims of the "class" members here which were adjudicated prior to *Coughlan* and in which the claimant failed either to appeal to the Benefits Review Board (BRB) within thirty days after an initial determination, *see* 30 U.S.C. § 932(a) (1982) (incorporating 33 U.S.C. § 921(a) (1982) of the Longshore and Harbor Workers' Act), or within sixty days to the court of appeals after a final agency decision. *See id.* (incorporating 33 U.S.C. § 921(c) (1982) of the Longshore and Harbor Workers Act). Therefore, according to the Secretary, these

claimants should not be afforded the benefit of the *Coughlan* decision because the BLBA provides the exclusive means of review of the class members' claims, and the periods of limitation in sections 921(a) and (c) bar their claims.

These claimants, however, deserve to have their claims heard. In the past, claimants under the BLBA have encountered enormous frustration in the processing of their claims due to administrative delays and determinations under improper standards. Congress has repeatedly attempted to ease the burden of proof of disability and to expedite black lung claims. More specifically, the BLBA's legislative history reveals Congress twice, in 1972 and 1977, instructed that then-pending or denied claims be reopened in order that claims could be readjudicated under what Congress believed to be more fair standards of disability.

The BLBA as established in 1969 (originally titled the Federal Coal Mine Health and Safety Act of 1969) provided benefits to coal miners who were totally disabled due to pneumoconiosis. Pub. L. No. 91-173, 83 Stat. 792 (codified as amended at 30 U.S.C. §§ 901-41 (1982 & Supp. III 1985)). The 1969 Act was divided into three sections: Part A (sections 901-02) provided general findings and definitions; Part B (sections 921-25) applied to claims filed before December 31, 1972, administered by the Secretary of Health, Education and Welfare; Part C (sections 931-41) applied to claims made after December 31, 1972.[3]

To qualify for benefits, the 1969 Act required a claimant to establish that the miner (1) had pneumoconiosis, (2) that arose out of coal mine employment, (3) causing total disability or death. 30 U.S.C. § 902 (1976) (codified as amended in 1972. To assist claimants in meeting these requirements, the 1969 Act provided an irrebuttable presumption, *see* 30 U.S.C.

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3. Part C allowed for alternative compensation either under a state statute meeting federal requirements or, absent such a statute, under a federal compensation system administered by the Secretary of Labor. 30 U.S.C. §§ 931-45 (1982). Under the federal program, the Department of Labor would attempt to locate a responsible mine operator who would make payments for the miner. If no such operator could be identified, payments would be made from federal funds. 30 U.S.C. §§ 932, 934.

§ 921(c)(3), and a rebuttable presumption. The rebuttable presumption presumed either that a disabled, 30 U.S.C. § 921(c)(1), or a deceased, 30 U.S.C. § 921(c)(2), miner's pneumoconiosis arose out of coal mine employment if the miner had worked ten years or more in an underground mine.

Claimants under the 1969 Act, however, encountered difficulties in proving total disability under the rebuttable presumption. X-rays initially read as positive were reread as negative by government-retained radiologists ("B-readers"); the standard of disability in the 1969 Act—requiring a miner to be unable to do any substantial work, 30 U.S.C. § 902(f)—proved difficult to meet; and deceased miners' spouses lacked sufficient evidence to prove the miners died from pneumoconiosis. *See* J. S. Lapatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 683-84 (1983). Because of the difficulties encountered by black lung claimants in gaining benefits under the 1969 Act, Congress found that the 1969 Act had not benefited "countless miners and their survivors who were the intended beneficiaries of the Black Lung program." Senate Rep. No. 92-743, 92d Cong., 2d Sess., *reprinted in* 1972 U. S. Code and Cong. & Admin. News 2305, 2307. Thus, in 1972, before the effective date of Part C, Congress amended the 1969 Act. Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified at 30 U.S.C. §§ 901-41 (1976)). The 1972 amendments extended the filing deadline under Part B to June 30, 1973, and delayed the effective date of Part C until January 1, 1974. 30 U.S.C. § 925 (1982).[4] The amendment also created an additional rebuttable presumption of pneumoconiosis for a miner without a positive x-ray. The presumption applied if the miner had fifteen years of underground coal mine employment and other evidence of a totally disabling pulmonary or respiratory impairment. 30 U.S.C. § 921(c)(4) (1982).

Finally, in order to redress the problem of excessive denials of past claims, the 1972 amendments required the Secretary of Health, Education and Welfare to reopen and review pending and

4. Claims filed between June 30, 1973, and January 1, 1974, were covered by 30 U.S.C. § 925.

denied claims under the new standards created by the 1972 amendments.[5] These reopened and pending claims were to be evaluated under new "interim" regulations, 20 C.F.R. § 410.490, the same regulations which this Court ultimately considered in *Coughlan*. The purpose of the regulations was to "permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments." 20 C.F.R. § 410.490(a). Under section 410.490, a miner's disability would be presumed to be due to pneumoconiosis if he or she submitted a positive x-ray and proved the disability arose out of coal mine employment. § 410.490(b).[6]

Once implemented, the "interim" regulations boosted significantly the number of approvals of Part B claims. J. S. Lopatte, *The Federal Black Lung Program: a 1983 Primer*, 85 W. Va. L. Rev. 677, 686 (1983).

Claims filed after January 1, 1974, under Part C, however, encountered obstacles to approval. Because no state black lung

5. 30 U.S.C. § 941 (1976) (amended 1977) states:

> The Secretary of Health, Education, and Welfare shall, upon enactment of the Black Lung Benefits Act of 1972, generally disseminate to all persons who filed claims under this subchapter prior to May 19, 1972, the changes in the law created by such Act, and forthwith advise all persons whose claims have been denied for any reason or whose claims are pending, that their claims will be reviewed with respect to the provisions of the Black Lung Benefits Act of 1972.

6. The presumption in 20 C.F.R. § 410.490(b) in pertinent part provides:

> (b) **Interim presumption.** With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
>
> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis * * * [.]
>
> * * * *
>
> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

programs had been federally approved by 1973, *id.* at 688, the Department of Labor undertook full supervision of the black lung program under Part C. The regulations used by the Department of Labor, 20 C.F.R. §§ 410.101-.476 (1986), proved to be much more restrictive than the interim regulations, and, hence, the approval rate slackened considerably.[7]

Congress again became dissatisfied with the low approval rate, this time under 20 C.F.R. §§ 410.101-.476, and in 1977, passed the Black Lung Benefits Reform Act of 1977. Pub. L. No. 95-239, 92 Stat. 95.[8] The purpose of the 1977 amendments was the same as the 1972 amendments: to expand the coverage of the original act and to lessen restrictions on eligibility. *See, e.g., Underhill* v. *Peabody Coal Co.*, 687 F.2d 217, 220 (7th Cir. 1982).

In the 1977 amendments, Congress specifically instructed the Secretary to adopt regulations with "criteria" no more restrictive than those in 20 C.F.R. § 410.490 and to apply them to all Parts B and C claims, including those pending or *denied* as of March 1, 1978, 30 U.S.C. § 945(b) (1982), as well as those Part C claims filed before April 1, 1980. 30 U.S.C. § 902(f)(2) (1982); *see also* H. R. Rep. No. 95-151, 95th Cong. 2d Sess. 25, 49, *reprinted in* 1978 U. S. Code Cong. & Admin. News, 237, 261, 284 (interpreting Section 12 of Black Lung Benefits Reform Act of 1977); House Conf. Rep. No. 95-864, 95th Cong., 2d Sess. 20, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 308, 314. Thus, Congress once more instructed the Department of Labor to reassess past denials under a more liberal standard of disability.[9]

7. Of the 128,000 Part C claims considered by the Department of Labor prior to March, 1978, only about half were processed. Of the processed claims, 68,100 were denied and 5,000 approved. *Id.* at 691 (citing *House Comm. on Ways and Means, Subcomm. on Oversight*, 97th Cong., 1st Sess., 13 (1981) Print No. 97-14).

8. Congress also passed the Black Lung Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 111, which created the Black Lung Disability Trust Fund. The Trust Fund raised money through an excise tax on the sale of coal to pay benefits where the coal mine operator(s) who employed the miner could not be found. 30 U.S.C. § 934.

9. Congress also instructed the Department of Health, Education and Welfare (now the Department of Health and Human Services) to notify Part B claimants that they had a right to have their pending or denied claim reconsidered under the 1977 amendments. 30 U.S.C. § 945(a)(1). Part B claimants had the option of having: (1) the Secretary of Health, Education and Welfare review the claim based on evidence already in the record "taking into account" the 1977 amendments, § 945(a)(1)(A), and if the claim was denied, it would be transferred to the Department of Labor for review with the opportunity to submit additional evidence, § 945(a)(2)(B); or (2) the claimant could elect to have the claim transferred directly to the Department of Labor with the opportunity to submit additional evidence, § 945(a)(1)(B). If the claimant chose to have the Department of Health, Education and Welfare review the claim, and it approved the claim, the Department would transfer the claim to the Department of Labor with "an initial determination of eligibility" directing that the Department of Labor provide payment of benefits in accordance with Part C. § 945(a)(2)(A).

Since the Department of Health and Human Services is not a party to this suit, we have restricted our analysis to the role of the Department of Labor.

After passage of the 1977 amendments, the Department of Labor adopted 20 C.F.R. Part 727 (1986). It was under these regulations that the Secretary of Labor was to review all claims filed before April 1, 1980, including those pending or denied as of the 1977 amendments.

As we observed in *Coughlan*, however, Part 727 did not provide "criteria" for determining disability under the BLBA, which were no more restrictive than those in the interim regulations contained in section 410.490. Section 410.490(b)(1)(i) presumed total disability due to pneumoconiosis upon showing of a positive x-ray and evidence that the impairment arose out of coal mine employment. Section 727.203(a)(1), on the other hand, required a miner to have worked ten years before a positive x-ray would be sufficient to invoke the presumption.[10] *Coughlan* eventually overturned this improper regulation. It did not, however,

10. The pertinent part of section 727.203 reads:

> (a) **Establishing interim presumption.** A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconisosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title)[.]

determine the fate of those claimants who had been denied benefits under the improper standard from March 1, 1978, to March 27, 1985, when *Coughlan* was decided.

Are the rights of the claimants which were violated sufficiently substantial or are the violations sufficiently patent to justify the invocation of mandamus jurisdiction? From the legislative history of the BLBA, it is clear that Congress has consistently demonstrated a deep concern for the plight of black lung benefits claimants. Congress reopened black lung claims in 1972 and 1977 in order that deserving claimants could more easily obtain benefits. In doing so, Congress overrode the BLBA procedures by specifically requiring the Department of Labor to review not only pending claims but also those claims that had been denied and to do so without regard to the thirty or sixty-day period of limitations in the BLBA. *See* 30 U.S.C. § 932 (1982). By reopening black lung claims twice and requiring adjudication under more liberal standards, Congress demonstrated that it considered the rights involved in those claims to be substantial. Therefore, with respect to those claims pending or denied as of the effective date of the 1977 amendments, March 1, 1978, Congress has indicated that those rights are substantial.

Similarly, those who filed their claims between March 1, 1978, and April 1, 1980, have substantial rights at stake. As previously mentioned, Congress has stated that all claims filed between March 1, 1978, and April 1, 1980, should be treated under the same standard as those pending or denied as of the 1977 amendments. *See* 30 U.S.C § 902(f)(2)(C). It should not be necessary for Congress to pass a third act requiring the Secretary to reconsider these claims under the proper standard.

In order for the district court to exercise mandamus jurisdiction, the agency over which jurisdiction is being exercised must also owe a clear nondiscretionary duty to act. *Heckler* v. *Ringer*, 466 U.S. at 616-17. The Secretary argues that no such duty is owed here. According to the Secretary, neither *Coughlan* nor the BLBA requires the Secretary to review *sua sponte* the denied claims of the claimants here.

The Secretary, while correct in his interpretation of *Coughlan*, ignores the duty created by the 1977 amendments to the BLBA. These amendments *inter alia* require that all pending or denied Parts B and C claims be reviewed under criteria no more restrictive than those contained in the interim regulation, section 410.490. They also require that all future claims be adjudicated under that same standard.

With respect to the claimants here who had claims pending or denied as of the 1977 amendments, Congress explicitly stated that the Secretary owed a duty to reopen their claims and review them under the new standard in the 1977 Amendments. The Secretary did not fulfill this obligation imposed on him by Congress. Even if review of those claims did occur, the Secretary did not do so under the proper standard. Therefore, the Secretary still owes this duty to these claimants.

As to the claims filed between the effective date of the 1977 amendments, March 1, 1978, and April 1, 1980, Congress has stated that these claims should be judged under the same standard. *See* 30 U.S.C. § 902(f)(2) (1982). The Secretary therefore owes the same duty to these claimants to reopen and consider their claims under section 410.490.[11]

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Besides arguing that the BLBA excludes the district court from exercising jurisdiction over the Department of Labor, the Secretary also contends that no court can review the appellants' or any "class" members' claims until they have exhausted their administrative remedies.

Before discussing this issue, we must clarify what claims of the appellants and the "class" are at issue. As stated in Section I, the district court could not properly exercise mandamus jurisdiction and determine *the validity* of the "class" members' claims for

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11. Because we hold the district court has jurisdiction under 28 U.S.C. § 1361, we do not consider appellant's claim that this court has mandamus jurisdiction under 28 U.S.C. § 1651.

benefits. The duty which the district court could require the Secretary to perform is a reopening of claims wrongfully denied under section 727.203(a) so that they could be considered under section 410.490. Once the Secretary has reopened the claims, the appellants and the "class" members must exhaust their administrative remedies with regard to their substantive claims. This Court therefore need only decide whether the "class" members must exhaust their administrative remedies in seeking to have their claims reopened and considered under section 410.490.[12]

The Supreme Court has adopted a pragmatic approach to statutory finality requirements. *Bowen* v. *City of New York*, U.S. , 90 L.Ed.2d 462, 477-78 (1986). *See also Polaski* v. *Heckler*, 751 F.2d 943, 951 (8th Cir. 1984) (citing *Mental Health Ass'n of Minnesota* v. *Heckler*, 720 F.2d 965, 969 (8th Cir. 1983)), *vacated and remanded*, U.S. , 90 L.Ed.2d 974 (1986), *reinstated*, 804 F.2d 456. In *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976), the Court held that waiver of the exhaustion requirement is appropriate "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."

The circumstances of this case reveal that deference to the agency is not appropriate. Although the Department of Labor has agreed to follow *Coughlan* in all cases still pending in the Eighth Circuit after the date of that decision, the agency refuses to reopen claims adjudicated prior to *Coughlan* where the claimant failed either to appeal to the BRB within thirty days after an initial determination or within sixty days to the court of appeals after a final agency decision. Further consideration of this issue by the Department of Labor will not in any way clarify or alter the agency's position. *See Mental Health Ass'n of Minnesota*, 720 F.2d at 970. Furthermore, this is not a case where agency expertise is needed to resolve the legal issue. *See Southern Ohio*

12. As noted in the previous section, the Secretary has agreed to follow *Coughlan* in all claims now pending in the Eighth Circuit. We construe this agreement to apply to pending claims in which the *Coughlan* issue was not specifically raised but is present.

Coal Co. v. *Donovan*, 774 F.2d 693, 702 (6th Cir. 1985) (certain procedures of the Federal Mine Safety and Health Review Commission held unconstitutional; coal mine operator's failure to exhaust administrative remedies not preclusive of judicial review). The matter involved is strictly legal: whether the Department of Labor owes a statutory duty to the "class" members to reopen their claims. We believe it does. Therefore, the "class" members do not have to exhaust their administrative remedies with regard to the issue of the reopening of their claims.

III. PERIOD OF LIMITATIONS.

The Secretary argues that even if he owes a clear substantive duty, a writ of mandamus cannot issue because the claims of "class" members may be procedurally barred by their failure to take timely administrative or judicial appeals from the denials of their claims under the BLBA. Thus, according to the Secretary, the Department of Labor is without jurisdiction to reopen such claims, and this Court is without jurisdiction to hear this appeal.

The statutory review scheme in the BLBA, as devised by the 1972 amendments, provides that a compensation order by an administrative law judge must be appealed within thirty days of issuance to the BRB. 30 U.S.C. § 932(a) (1982) (incorporating 33 U.S.C. § 921(a) (1982) of the Longshore and Harbor Workers' Compensation Act). Decisions of the BRB must be appealed to the circuit courts of appeals within sixty days. *Id.* (incorporating 33 U.S.C. § 921(c) (1982) of the Longshore and Harbor Workers' Compensation Act).

We hold that despite these administrative and judicial appeals limitations, the Department of Labor has jurisdiction to reopen the claims of the "class" members whose claims were wrongfully denied under 20 C.F.R. § 727.203(a), although the denials may not have been timely appealed.

As discussed in Section I, the Secretary continues to owe a duty to all "class" members whose claims were not properly reopened and adjudicated according to the eligibility standard recognized in *Coughlan*. That duty arises for all claims pending or denied as

of the 1977 amendments from 30 U.S.C. § 945 of the BLBA in which Congress, by implication, waived the thirty and sixty-day deadlines for appeals of those claims under the BLBA.

Clearly Congress had the authority to waive the limitation created by the deadlines. Because the appeals deadlines are creatures of legislation, Congress could change or disregard the deadlines regardless of whether the deadlines are considered jurisdictional. While any disregard or lengthening of the thirty or sixty-day periods must be strictly construed as an extension of a waiver on sovereign immunity, *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983), a court cannot restrict the waiver more severely than Congress intended. *Bowen* v. *City of New York*, U.S. , 90 L.Ed.2d at 474 (citing *Block*, 461 U.S. at 287).

In addition, section 945(b)(1) states that review by the Secretary of Labor of those claims should "tak[e] into account the amendments made to this part by the Black Lung Benefits Reform Act of 1977." The Secretary has yet to take properly "into account" the 1977 amendments. Therefore, the Secretary continues to have this obligation to reopen these claims under the *proper standard* as recognized in *Coughlan*.

In regard to those claims filed between March 1, 1978, and April 1, 1980, Congress also stated in section 902(f)(2)(c) that the Secretary of Labor should not apply criteria more restrictive than those contained in 20 C.F.R. § 410.490. Thus, although Congress never directed that these claims be reopened, Congress did instruct that these claims be adjudicated under the same standard as those pending or reopened under the 1977 amendments. It would therefore be contrary to congressional intent to allow claims pending or denied as of March 1, 1978, to be treated under a different standard than claims filed between March 1, 1978, and April 1, 1980. Therefore, any claims filed between March 1, 1978, and April 1, 1980, which were subsequently denied should be reopened along with those claims pending or denied as of March 1, 1978.

The Secretary also contends that the thirty- and sixty-day periods of limitation in 33 U.S.C. § 921(a) and (c) are jurisdictionally based and limit the district court's mandamus jurisdiction.[13] We disagree. We find no grounds for concluding that these periods of limitations affect the district court's mandamus jurisdiction. *See Ellis* v. *Blum*, 643 F.2d 68, 78-82 (2d Cir. 1981) (determining that 42 U.S.C. § 405(h) of the Social Security Act does not completely prohibit mandamus jurisdiction in the district courts to review agency action).

The periods of limitation in 33 U.S.C. § 921(a) and (c) exist within the BLBA's specific statutory review scheme and become largely unmeaningful for actions based on jurisdictional grants outside of the BLBA, such as mandamus under section 1361. *See City of New York* v. *Heckler*, 742 F.2d 729, 739 n.7 (2d Cir. 1984) (mandamus jurisdiction of district court in social security action unaffected by sixty-day period of limitations in 42 U.S.C. § 405(g)), *aff'd on other grounds, City of New York*, U.S. , 90 L.Ed.2d at 462. Specifically, neither the thirty-day limitation on administrative appeals nor the sixty-day limitation on appeals to the circuit courts contemplates a claim before the district

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13. As the Secretary observes, three Circuits have held the thirty-day administrative appeal period to be jurisdictionally based. *See Insurance Co. of North America* v. *Gee*, 702 F.2d 411 (2d Cir. 1983); *Wellman* v. *Director, Office of Workers' Compensation*, 706 F.2d 191 (6th Cir. 1983); *Bennett* v. *Director, Office of Workers' Compensation*, 717 F.2d 1167 (7th Cir. 1983). And, four Circuits, including this Circuit, have held that the sixty-day judicial appeal period is jurisdictional. *Clay* v. *Director, Office of Workers' Compensation*, 748 F.2d 501 (8th Cir. 1984); *Pittson Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom., Northwest Marine Terminal* v. *Caputo*, 432 U.S. 249 (1977); *Midland Ins. Co.* v. *Adam*, 781 F.2d 526 (6th Cir. 1985); *Arch Mineral Corp.* v. *Office of Workers' Compensation Programs*, 798 F.2d 215 (7th Cir. 1986).

The nature of the periods of limitations in 33 U.S.C. § 921(a) and (c), however, may have to be reevaluated in light of *Bowen* v. *City of New York*, U.S. , 90 L.Ed.2d at 462. In *City of New York*, a class sued the Social Security Administration arguing that an unlawful unpublished policy of the Administration caused deserving claimants to be denied benefits. U.S. , 90 L.Ed.2d at 470. Many members of the class had not appealed their denials within sixty days. The Court found that the sixty-day requirement in 42 U.S.C. § 405(g) was not a jurisdictional bar to review by the federal courts.

court.[14] Therefore, once it has been determined, as it was in Sections I and II, that the BLBA permits, in limited circumstances, the exercise of mandamus jurisdiction by the district court and that the circumstances of this case fit within those limitations, the periods of limitations contained in the BLBA cannot be considered a further limitation on the mandamus jurisdiction of the district court.

IV. CONCLUSION.

On remand, the district court should certify a class consisting of those persons who (1) have filed claims for benefits under the BLBA between December 30, 1969, and April 1, 1980; (2) have claimed a disability due to pneumoconiosis caused by employment in the coal mining industry; (3) have submitted a positive x-ray as proof of the presence of pneumoconiosis; (4) have been denied the benefit of the presumption of pneumoconiosis contained in 20 C.F.R. § 727.203(a)(1) because they did not prove that they had worked ten years in the coal mines; (5) were not afforded the opportunity to submit a claim under 20 C.F.R. § 410.490; and (6) do not have claims under 20 C.F.R. § 410.490 or 20 C.F.R. § 727.203(a)(1) currently pending before the Department of Labor. We emphasize that the Secretary is to consider each claim individually and that appeals from these decisions will be made in accordance with the review scheme of the BLBA.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

14. 33 U.S.C. § 918 grants jurisdiction to the district court for the limited purpose of collecting defaulted compensation payments. This provision is irrelevant to this dispute.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI James Sebben, et al., *Appellants,* vs. William E. Brock, III, etc., et al., *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

June 25, 1987

Order entered at the Direction of the Court:

/s/ Michael E. Gans, Chief Deputy

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI James Sebben, et al, *Appellants,* vs. William E. Brock, III, etc., et al. *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

The petition for rehearing with suggestion for rehearing en banc submitted by movants to intervene, Pittston Coal Group, et al, is denied.

July 24, 1987

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI John Sebben, et al., *Appellants,* vs. William E. Brock, III, etc., et al., *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

It is ordered by the Court that motion filed by Old Republic Insurance Company, et al, for leave to intervene and file petition for rehearing be granted.

And it is further ordered that Old Republic Insurance Company, et al., be granted an extension until May 8, 1987, in which to file the petition for rehearing.

May 8, 1987

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI James Sebben, et al., *Appellants,* vs. William E. Brock, III, etc., et al., *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

It is ordered by the Court that the following motions be granted:

1. Motion of Pennsylvania National Insurance Group and Barnes and Tucker Company for leave to intervene; and
2. Motion for leave to file brief of amicus curiae on behalf of the National Council on Compensation Insurance.

May 26, 1987

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES SEBBEN, et al., *Plaintiffs,* vs. WILLIAM E. BROCK, III, et al., *Defendants.*	Civil No. 85-589-A RULING ON MOTION TO DISMISS

This case comes before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction. A hearing on the motion was held on January 30, 1986. Appearances are noted in the clerk's minutes for that date.

Under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45, a coal miner is entitled to disability benefits if he is totally disabled by pneumoconiosis arising out of his coal mine employment. A presumption of total disability arises from evidence of a chest x-ray establishing the existence of pneumoconiosis. 20 C.F.R. § 410.490(b)(1)(i). In *Coughlan* v. *Director, Officer of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the court held that this presumption is available in cases covered by a 1977 amendment to the Act.

Plaintiffs are unsuccessful Black Lung benefits applicants who contend that they were erroneously denied the presumption of total disability recently recognized in *Coughlan*. They seek a writ of mandamus directing defendants to review past applications under the Act to identify applicants who should have received the benefit of the presumption.

Plaintiffs rest their claim for jurisdiction in this Court on 28 U.S.C. § 1361, which reads in its entirety: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

This statute has been construed to authorize district court intervention if an officer is acting without authority, contrary to a clear duty, or in clear abuse of his discretion. Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 3655; see *Miller* v. *Ackerman*, 488 F.2d 920 (8th Cir. 1973) (official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted).

In the case at hand, plaintiffs assert that defendants had a duty to apply the presumption of § 410.490(b), but failed to do so. As a result, plaintiffs argue, defendants now have a duty to reconsider past applications. While *Coughlan* supports the premises to plaintiffs' syllogism, the conclusion does not necessarily follow. The opinion in *Coughlan* is silent with regard to whether its holding should be retroactively applied, and the Court knows of no other source for the duty advanced by plaintiffs. Accordingly, it would not be proper for the Court to exercise mandamus jurisdiction.

There is a second, more fundamental, reason for this Court to decline jurisdiction. Congress has conferred upon the circuit courts of appeal sole and exclusive jurisdiction to review administrative action under the Black Lung Benefits Act.[1] E.G., *Louisville and Nashville Railroad Co.* v. *Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983). Thus, the proper procedure for contesting defendants' action or inaction is to exhaust the administrative remedies provided under the statute and then to seek review, if desired, in the court of appeals, rather than to pursue a writ of mandamus in this Court.

The Court recognizes that requirements of finality and formality impose obstacles that in rare instances might preclude statutory court of appeals review of agency actions. See Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 3943. Under such circumstances, an argument can be made that Congress did not intend to forbid the district courts from

1. The Act allows for district court jurisdiction in only two very narrow situations involving enforcement of compensation orders.

taking jurisdiction. "Generally, however, when Congress has specified a procedure for judicial review of administrative action, courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review . . . ." *Louisville and Nashville Railroad Co.* v. *Donovan*, 713 F.2d 1243, 1247 (6th Cir. 1983), quoting *Nader* v. *Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972). Here, as indicated earlier, plaintiffs have not made the required showing. If plaintiffs are, in fact, precluded from obtaining statutory court of appeals review, perhaps resort may be had to the All Writs Act, 28 U.S.C. § 1651, which empowers courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." In light of the clear Congressional preference for circuit court review of matters pertaining to the Black Lung Benefits Act, and in further view of the circuit courts' expertise in these matters, such an approach should be favored over mandamus relief by this Court.

IT IS THEREFORE ORDERED that defendants' motion to dismiss plaintiffs' action is hereby granted.

Signed this 6 day of February, 1986.

/s/ W.C. STUART

W.C. STUART, JUDGE
SOUTHERN DISTRICT OF
IOWA.

SUPREME COURT OF THE UNITED STATES
No. A-219

PITTSTON COAL GROUP, ET AL.,

Applicants,

v.

JAMES SEBBEN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 20, 1987.

/s/ Harry A. Blackmun

Associate Justice of the Supreme
Court of the United States

Dated this 17th
day of September, 1987.

U.S. CONST.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

30 U.S.C. § 902(f)

§ 902. Definitions

For purposes of this subchapter—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

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30 U.S.C. § 932(a)

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§ 932. Failure to meet workmen's compensation requirements

(a) Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C.A. § 901 et seq.], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C.A. §§ 901, 902, 903, 904, 908, 909, 910, 912, 913, 929, 930, 931, 932, 933, 937, 938, 941, 943, 944, 945, 946, 947, 948, 948a, 949, 950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of

employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

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33 U.S.C. § 919

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§ 919. Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Notice of claim

Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) Investigations; order for hearing; notice; rejection or award

The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the

claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a[1] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) Filing and mailing of order rejecting claim or making award

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) Awards after death of employee

An award of compensation for disability may be made after the death of an injured employee.

(g) Transfer of case

At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of

1. So in original. Probably should be "an".

making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) Physical examination of injured employee

An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

33 U.S.C. § 921

§ 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have

the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to

conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District Court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the

order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

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20 C.F.R. § 410.490

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§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease

and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) as demonstrated by values

which are equal to or less than the values specified in the following table:

	Equal to or less than —	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than —	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

May 25, 1978

Robert B. Dorsey
Chief, Branch of Claims Determination
Division of Coal Mine Workers' Compensation
Office of Workers' Compensation Programs
Employment Standards Administration
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Dorsey:

The following memorandum and appendix constitute the written comments of the Members of the House Committee on Education and Labor on Parts 727 and 725 of the proposed Black Lung Regulations.

We wish to thank the Department for the opportunity to offer comments on these regulations, and hope that our suggestions will prove helpful to you.

Sincerely,

.....	.....
/S/ CARL D. PERKINS	/S/ JOHN H. DENT
.....	
/S/ PAUL SIMON	

Introduction

In consideration of the enactment of the Black Lung Benefits Revenue Act of 1977 ("Revenue Act"), and the Black Lung Benefits Reform Act of 1977 ("Reform Act"), the Department of Labor ("Labor", "DOL") promulgated a new set of proposed regulations,[1] which act to implement the changes made by these pieces of legislation in the Federal Mine Safety and Health Act of 1977 (the "Act"). The proposed regulations possess many positive features, that, when considered in their totality, go far to carrying out the recent reforms made by Congress in the Black Lung statutory scheme. Among other things, these rules clarify and expand the definitions of pneumoconiosis and miner, liberalize evidentiary and eligibility standards, establish a workable framework for the operation of the Black Lung Disability Trust Fund and attempt to streamline the procedure that an individual must follow in the presentation of his claim. Though in many instances the proposed regulations do not contain the degrees of liberality and flexibility that the Members of the Committee would have favored, we are mindful of the fact that the Department must try to be even-handed and open-minded in fashioning a regulatory structure that will be equitable to all the parties at interest. The laudatory effort undertaken by the Department to reach this goal must be generally applauded, for a review of these rules clearly indicates that DOL sincerely engaged in a good faith effort to accommodate the conflicting interests of claimant and operator, and to follow the legislative intent of Congress.

However, the Committee must take strong exception to a number of procedural changes made by these regulations.[2] It is the Committee's fervent belief that the procedural rules discussed below would, if left unchanged, severely impact upon the ability of a claimant to adequately present his case before the Department. Therefore, the Members of this Committee must respectfully, but emphatically, urge that DOL reconsider the proposed rules noted below and move to amend these regulations

1. [Footnotes not accessible.]

in accordance with the suggestions of the Committee. Before embarking upon a discussion of the general procedural aspects of the regulations, as found in Part 725, these comments will first focus on Part 727, that part of the proposed regulations which establishes the specific procedures for the processing of pending and denied claims brought pursuant to Section 435 of the Act.

Part 727

This part, like Part 725, contains many favorable provisions indicative of DOL's efforts to implement the Congressional intent behind this new Black Lung legislation, as well as a handful of other provisions which could create unnecessary difficulties for a claimant seeking relief. More specifically, the Committee strongly supports the re-promulgation of the interim standards, as found in Section 727.203(a). Furthermore, the decision of the Department to increase the blood gas standards by five points over that found in the present interim standards[3] is especially noteworthy, though it must be stated that the Committee believes that present medical evidence justifies raising the standards at least another five points. In addition, the Department's efforts to provide a mechanism for the expedited review of claims pending before an administrative law judge ("ALJ") (*See* Section 727.405(a)) deserves praise, though it would be preferable to give the claimant the option to choose between either having his claim heard before an ALJ or having the claim sent back to the deputy commissioner for expedited review. However, some of the proposed regulations contained within this part should be changed to make the procedure more efficient and to afford a claimant more equitable treatment than he would receive under these rules.

The first serious difficulty with these rules arises in Section 727.105, which concerns the course of action DOL will take once a claim has been certified for approval by the Social Security Administration ("SSA"). In comparing paragraph (a) with paragraph (b) of this provision, it will be noted that the Department provided for immediate payment of the basic benefit

to a certified SSA claimant *only* if a responsible operator cannot be identified or if a claimant's mining employment terminated prior to January 1, 1970; in the instances in which a responsible operator is identified, the regulation makes *no* provision for immediate payment, but instead forces the claimant to carry his claim through the entire DOL Black Lung adjudication machinery before he would receive any payment—even though his claim had been previously certified by SSA. *See* §727.105(b)(4) & (5). Such a proposition is directly contrary to the express intent of Congress, for both the statute and the legislative history make abundantly clear that once SSA certified a claimant eligible to receive payment, the Secretary of Labor "shall immediately make or otherwise provide for the payment of the claim ...." *See* Section 435(a)(2)(A) of the Act. The Joint Explanatory Statement of the Conference Committee, as well as the remarks of Senator Randolph and Congressman Perkins during the course of debate on the Reform Act, heavily underline the fact that it is the duty of the Secretary of Labor to make immediate and full payment to SSA certified claimants.[4] Nowhere in the statute, in the Joint Explanatory Statement nor in the floor debate was there any indication that Congress sought to distinguish SSA certified claims on the basis of whether DOL could find a responsible operator. *All* claimants certified by the Social Security Administration as eligible to receive benefits are to receive payment immediately and in full from the Secretary of Labor, once DOL receives the claimant's file. Paragraph (b) should therefore be significantly altered to reflect the clear and unambiguous intent of Congress on this score. The failure of the Department to do so up to now clearly contravenes the express intent of Congress, and so should be rectified.[4^]

The Committee must also take exception, in part, to the Department's definition of pneumoconiosis set out in Section 727.202. The last sentence of this section provides that pneumoconiosis "does not include cancer or any disease of bacteriological or viral origin." Whether cancer or an infection or "any disease" are caused or hastened by the inhalation of coal

dust is a matter of fact to be established in each case. The present state of medical knowledge is not sufficient to exclude the possibility that cancer or a disease may have been caused by the inhalation of coal dust.

Certain language in Part 727 also acts to raise questions as to how the Department actually intends to treat the x-ray evidence of a Section 435 claimant. In Section 727.203(a)(1), DOL follows the exact wording of the interim standards covering x-ray evidence-that an x-ray alone can establish the presence of pneumoconiosis.[5] However, Section 727.206(b) of the proposed rules states that in "all claims where there is other evidence of a pulmonary or respiratory impairment a board-certified or board-eligible radiologist's interpretation of a chest x-ray shall be accepted by the Office if the x-ray is in compliance with ... §410.428(b) ...." Though this statement follows the prescription contained in Section 413(b) of the Act, it should be emphasized that Section 413(b) was not meant to impose upon a Section 435 claimant a more rigorous burden than that found in the interim standards. If a miner-claimant has been engaged in coal mine employment for 10 years and presents an x-ray establishing the presence of pneumoconiosis which meets the quality standards of 20 CFR §410.428, he may invoke the interim presumption found in Section 727.203(a)(1). There is no need for such a claimant to have "other evidence of a pulmonary or respiratory impairment" if his x-ray establishes the presence of pneumoconiosis. Paragraph (b) should be altered to reflect the fact that an x-ray in compliance with the requirement of §410.428(b) which establishes the presence of pneumoconiosis shall be sufficient to satisfy the interim presumption.

Further difficulties present themselves in subparagraph (b)(1) of this Section. This provision holds that nothing in this section "shall preclude the consideration of any other relevant evidence including other x-rays and x-ray interpretations in determining the presence or absence of pneumoconiosis." If "other relevant evidence" is meant to include the subsequent interpretative analyses of x-rays undertaken by radiologists consulted or

employed by the government, then this provision is in error. Both the House and Senate reports on the Reform Act criticized the government for imposing a panel of "second guessers," and sought to limit government review only to objective determinations of quality.[6] If this subparagraph is retained in any form, it should expressly state that the government's review of x-rays shall be limited to only the issue of objective determination of quality, and that the government's review of x-rays shall not be concerned with whether an x-ray establishes the presence of pneumoconiosis. This subparagraph should make clear that interpretations by government consulted or employed radiologists of a party's x-rays taken by board certified or board eligible radiologists on subjects other than the objective determination of an x-ray's quality shall not be considered admissible as evidence. To allow the introduction into evidence of government interpretations on other matters would directly contradict the legislative intent of the Congress on the use of x-rays in a claimant's case.

The Committee must also express its concern over the additional language added by DOL to Section 727.302. Its counterpart under the old regulations, 20 C.F.R. §725.503, did not contain this language. Both sections relate to the subject of fixing a date from which benefits are payable after review and approval, and both provide that benefits shall be payable to eligible beneficiaries beginning with the month of onset of total disability. *Compare* 20 C.F.R. §725.503(a) *with* Section 727.302(c)(1), (d)(1). However, Section 727.302 adds a new sentence to subparagraphs (c)(1) and (d)(1), which provides that where the evidence does not establish the month of onset, benefits shall be payable from the month during which the miner elected review. It must be stated that there exists a strong fear that this sentence will serve as the instrument by which the Department will proceed to deny retroactive relief to successful claimants. Furthermore, a number of parties in the field and in the federal bureaucracies expressed the opinion that though the month of onset may not be able to be determined with exact

certainty, nearly all benefit programs including Social Security and workmen's compensation, manage to establish a month of onset. Moreover, it seems curious that for almost five years the Department did not by regulation employ such an expedient and explicit cutoff device, yet reported no previous difficulties with the prior practice of determining the month of onset of total disability. In order to placate the fears of many individuals in the Congress and in the field, and to encourage the reviewing officials to exercise the utmost diligence in their efforts to establish a month of onset, the Committee believes that the Department should emphasize in these paragraphs that resort to the back pay cutoff device should not be had until the reviewing official is certain that a month of onset cannot be established.

A final comment on Part 727 involves Section 727.402, the provision covering the adjudication of claims pending in the office of Administrative Law Judges. As mentioned previously, the Committee applauds the effort of the Department to provide for expedited review of these claims, once they are remanded to the Deputy Commissioner's Office. See 727.405. It would still be preferable, though, for the individual whose claim is pending before an ALJ to be given the option of either having that claim decided by the ALJ or allowing the claim to be returned to the Deputy Commissioner for expedited review. At present, the proposed regulations grant the Director of the Office of Workmen's Compensation Programs ("OWCP") the power to obtain the remand of an individual's claim pending before an ALJ to the Deputy Commissioner's Office. *See* 727.402(b). Paragraph (e) of this section additionally allows for the immediate remand of a claim to the commissioner's office, if that claim has been denied by an ALJ. Again, the claimant should have the option of either pursuing his claim on appeal to the Benefits Review Board ("BRB"), or returning to the Deputy Commissioner's office for further consideration of his claim.

Nos. 87-821 and 87-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, *et al.*,
Petitioners,
v.
JAMES SEBBEN, *et al.*,
Respondents.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, *et al.*,
Petitioners,
v.
JAMES SEBBEN, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

This case involves the claims of thousands of coal miners who filed for benefits under the Black Lung Benefits Act prior to April 1, 1980 but still have not received the benefits to which they may be entitled. Respondents alleged below that they, and the class they seek to represent, have been denied benefits because of the Secretary of Labor's failure to comply with a clear statutory duty

created by the Black Lung Benefits Reform Act of 1977 (the "1977 Amendments"). This statute required the Secretary to review *sua sponte* the files relating to all pending and previously denied claims, 30 U.S.C. § 945(b), applying new "criteria" that were not "more restrictive" than the "interim regulations" then being used by the Social Security Administration (SSA) to adjudicate the group of claims filed prior to July 1, 1973, *id.* § 902(f)(2). Respondents' basic argument is that the Department of Labor never performed reviews satisfying this requirement, because the Secretary refused, by regulation, to apply SSA's interim presumption of disability due to pneumoconiosis in the class of cases in which the miner had not shown evidence of ten years of coal mine employment.[1]

The issues presented for review by the petitioners are essentially twofold. The first question is the same as that presented in the pending petitions for certiorari in No. 87-1045, *Director, Office of Workers' Compensation Programs v. Kyle*, and No. 87-1095, *Director, Office of Workers' Compensation Programs v. Broyles*—*i.e.*, whether the Secretary acted consistently with the 1977 Amendments in refusing to apply the interim presumption absent a showing of ten years of coal-mine employment.[2] The second question involves the scope of the remedies available assuming, as four circuits have held, that the

[1] As discussed *infra*, the SSA regulations applied the interim presumption in any case where the claimant either had worked for ten years in the mines or had submitted other evidence that his "impairment . . . arose out of coal mine employment." 20 C.F.R. § 410.490(b)(2). Respondents below also sought to assert the rights of claimants who filed for benefits after the effective date of the 1977 Amendments but before the promulgation of the "permanent" Labor Department regulations. Such claims were also required to be adjudicated under standards no "more restrictive" than the SSA criteria. 30 U.S.C. § 902(f)(2)(C).

[2] This question, as a formal matter, has been presented in this case only by the private petitioners in No. 87-821.

Secretary's action was illegal—*i.e.*, whether respondents and the class they seek to represent may sue in district court to enforce their statutory right to a valid Secretarial review of their files without pursuing the administrative appeals process provided in the Act.

Respondents acknowledge that the conflict among the circuits on the first question may well require the Court to address that question in this or another case. However, if the Court does determine that the first issue is worthy of review, we do not believe that the Court should necessarily accept the Solicitor General's suggestion that it grant review in a case that raises solely that issue and hold the instant petitions.[3] A hold would be appropriate if the Court agrees with us that the second question presented here—the question of the proper scope of relief assuming the invalidity of the Secretary's regulations—is not independently worthy of review. However, if the Court disagrees with us concerning the independent importance of this question, then we would ask that it issue a writ of certiorari in this case now to allow simultaneous resolution of both questions, rather than holding this case pending the decision in a case raising only the former question.

STATEMENT

The Black Lung Benefits Act, passed in 1969, provided for benefits to those who are disabled by coal-mine-related pneumoconiosis, or "black lung," under two different parts. Part B, administered by the Secretary of Health, Education and Welfare through the SSA, was to provide benefits paid out of federal funds to claimants who filed prior to the end of 1972.[4] Part C, administered by the Secretary of Labor,[5] applies to all subsequent claims and

[3] *See* Petition for the Deputy Secretary of Labor *et al.* (hereinafter "U.S. Pet.") at 10, 16-17.

[4] This date was later extended to June 30, 1973. See 30 U.S.C. §§ 924, 925.

provides benefits paid either by coal-mine employers or by a special federal trust fund. *See generally Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427 (1987). The 1969 Act was substantially amended in 1972 in an effort to correct what was perceived as an unduly high rate of rejection of Part B claims.[6] The 1972 amendments called for the reopening of denied Part B claims and the application to all Part B claims of new, more liberal, statutory and regulatory standards.[7]

One key consequence of the 1972 legislation was a regulation creating the SSA "interim presumption" at issue here. Like various presumptions set out in the statute itself, this one was created in response to a recognition that "it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal-mine related, or that those diseases are in fact pneumoconiosis." *Mullins*, *supra*, 108 S. Ct. at 439. Under this regulation, a Part B claimant had the benefit of a rebuttable presumption of compensable pneumoconiosis if he produced one of several forms of specified medical evidence, 20 C.F.R. § 410.490(b)(1), and either had more than ten years of work history in coal mines, *id.* § 410.490(b)(3), *or* had submitted evidence that his "impairment . . . arose out of coal mine employment," *id.* § 410.490(b)(2). *See Mullins*, 108 S. Ct. at 437. As a result of this presumption, the rate of approval of Part B claims by the SSA increased substantially during the 1970s. However, the approval rate for the Part C claims that the Secretary of Labor began to

[5] States have the option under Part C of handling the claims themselves by setting up a qualifying workers' compensation system. *See* 30 U.S.C. § 931.

[6] Pub. L. No. 92-303. 86 Stat. 150 (1972).

[7] *Id.* § 6.

consider in 1974 remained very low, "in large part because of the absence of an interim presumption" in the separate regulations then governing Part C. *Id.*[8]

In the 1977 Amendments, Congress again changed the statute in an effort to redress the perceived problems of inappropriate denials of Part C claims and resulting inequity between Part B and Part C claimants.[9] It did so by requiring the Secretary of Labor to promulgate and apply new regulations for determining eligibility based on "criteria" that were not "more restrictive" than those being used under Part B. 30 U.S.C. § 902(f)(2).[10] Congress further provided that the Secretary of Labor should "review each claim" that had been denied or was pending under Part C "taking into account" the 1977 Amendments and should "approve any such claim forthwith if the provisions of this part, as so amended, require that approval, and . . . immediately make . . . payment of the claim . . . ." *Id.* § 945(b)(1).[11] The Secretary was instructed that if the materials in the existing file were "sufficient for approval of the claim," he should not require submission of any additional evidence, *id.* § 945(b)(2)(A), and was further instructed to pay meritorious claims retroactively, *id.* § 945(c).

[8] *See generally* Lopatto, "The Federal Black Lung Program: A 1983 Primer," 85 W. Va. L. Rev. 677, 684-87, 691 (1983).

[9] Pub. L. No. 95-239, 92 Stat. 95 (1978).

[10] These new "interim" standards were to apply to all prior claims as well as all claims filed prior to the promulgation of new permanent Labor Department regulations consistent with the 1977 act. *Id.*

[11] Congress also provided that pending or denied Part B claims should, at the option of the claimant, either be reviewed by the Secretary of Health and Human Services, followed by Labor Department review, *id.* § 945(a)(1)(A), (2), or be referred directly to the Secretary of Labor for review consistent with the 1977 Amendments, *id.* § 945(a)(1)(B), (3).

The Secretary responded to the 1977 legislation by promulgating new "interim" regulations that created a rebuttable presumption of disability that was similar to the Part B standards. 20 C.F.R. § 727.203. *See Mullins*, 108 S. Ct. at 431. However the presumption was available *only* to claimants who had had ten years of work in coal mines.[12] In contrast to the Part B regulations, there was no way in which a person with a shorter work history could invoke the presumption. As petitioners note, five circuits have addressed the validity of this limitation on the presumption, and four have held that it violates the statutory command that the Secretary apply interim criteria that are not "more restrictive" than the existing Part B criteria.[13]

The present case was filed soon after the Eighth Circuit's *Coughlan* ruling adopted the majority position on this statutory issue. Respondents, four Iowa coal miners who filed for benefits during the 1970s, sought designation as representatives of the class of all persons who (1) were denied the benefit of the interim presumption by virtue of the Secretary's rule limiting it to persons with ten or more years of mine exposure, and (2) had not pursued their claims further through individual administrative appeals. The defendants were the Secretary of Labor and various of his subordinates. Jurisdiction was predicated on 28 U.S.C. § 1361, the general manda-

[12] Section 727.203(a) limits the presumption to a "miner who engaged in coal mine employment for at least 10 years."

[13] Decisions rejecting the Secretary's position are *Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir. 1987), *cert. filed*, No. 87-1045 (December 21, 1987), and *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987), *cert. filed*, No. 87-1095 (December 29, 1987). The sole decision upholding the Secretary is *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987).

mus statute. As relief, respondents sought an order requiring the Secretary to review the files of all the class members under legally valid standards, as well as creation of a procedure whereby plaintiffs' counsel could conduct their own reviews of the Secretary's actions in each case.[14]

The defendants moved to dismiss the case for want of jurisdiction, arguing that the existence of an administrative review process for black lung claims—culminating in court of appeals review of decisions of the Labor Department's Benefits Review Board—precludes district court jurisdiction over the instant case. The plaintiffs responded that their claim of a right to appropriate Secretarial reviews of their files could only be vindicated through this case, and that jurisdiction was therefore not precluded. The district court granted the motion to dismiss. U.S. Pet. App. 19a-22a.

On appeal, a unanimous panel of the U.S. Court of Appeals for the Eighth Circuit reversed. It acknowledged that statutory review procedures are "generally the exclusive means of review," and that there is a presumption against the availability of "simultaneous review of administrative actions in both the district court and the circuit court of appeals." U.S. Pet. App. 3a-4a. But, citing precedent from the Sixth and D.C. Circuits, it held that there is a " 'residuum' " of jurisdiction in the district courts to enforce the Black Lung Benefits Act in a case of a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review.' " U.S. Pet. App. 4a (quoting *Louisville & Nashville Railroad*

[14] If claims are ultimately approved by virtue of the decision below, most will be paid, not by operators of mines, but by the federal Black Lung Disability Trust Fund. *See* 30 U.S.C. § 932(c), (j) (providing that claims granted by virtue of Secretarial reviews of files under § 945 will be paid by the fund if they were previously denied before March 1, 1978).

Co. v. Donovan, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), and *Nader v. Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972)). That jurisdiction, it held, is provided by section 1361, the mandamus statute. *Id.*

The court went on to conclude that the Secretary had violated a "clear nondiscretionary duty" to "reopen . . . and review claims" that were pending or denied as of 1978 under the revised standards contained in the 1977 Amendments. U.S. Pet. App. 4a-13a. This duty, it held, was not fulfilled with respect to claimants with less than ten years of mining employment, because they were denied the benefit of a review based on the presumption mandated by Congress.[15] The court then stated that vindication of this clear right through mandamus was not foreclosed either by the usual requirement of exhaustion of administrative remedies or by the limitations periods applicable in that administrative process. U.S. Pet. App. 13a-18a. Exhaustion and time limits for appeals, it held, do not come into play until after the Secretary has complied with his obligation to review each file under the revised standards and notified each claimant of the result.

The Eighth Circuit remanded the case with instructions to certify an appropriate class and award the limited relief of new, legally valid Secretarial reviews of the class members' files. After entry of judgment, the Secretary, along with various intervenors who are now among the private petitioners in No. 87-821, sought a rehearing *en banc*. These requests were denied on June 25 and July 24, 1987.

[15] The court also found a violation of the same basic duty with respect to claims filed after March 1, 1978 and prior to April 1, 1980, which, according to the 1977 Amendments, were also required to be adjudicated under interim criteria not "more restrictive" than the earlier SSA regulations. U.S. Pet. App. 12a-13a.

ARGUMENT

As we noted at the outset, respondents acknowledge that the "substantive" issue in this case—whether the Secretary's regulations violated the 1977 Amendments by denying the interim presumption to all miners with less than ten years of mining employment—may be worthy of review because the Seventh Circuit's recent ruling on the issue conflicts with the holdings of four other circuits.[16] Our discussion here is addressed primarily to whether, assuming that the Court is disposed to grant one of several petitions presenting this issue, it should grant the instant petition to decide the unique "remedial" questions presented by the Eighth Circuit's ruling regarding the reopening of cases that are not now pending in the administrative review process.

I. If the Court Is Disposed to Resolve the Underlying Conflict Among the Circuits, and Considers the Remedial Issues Presented Here Independently Worthy of Review, It Should Grant this Petition Rather than Holding it for Later Consideration.

The federal petitioners in No. 87-827, unlike the private petitioners in No. 87-821, have suggested that this Court should hold the instant petition and grant review in another case to decide whether the Secretary's interim regulations are legally valid. They further suggest that the Court should grant review in this case at a later date—if the substantive issue is decided against the Secretary—to decide the separate remedial issues presented only in this case. U.S. Pet. 10, 16-17. Our position is that the Court should not accept, without careful consideration, this invitation to bifurcate disposition of the questions presented here. While we do not believe that the separate remedial issues are independently worthy of review, if the Court disagrees it would be more appropriate to grant this case now in order to resolve all

[16] *See* note 13 *supra*.

issues simultaneously. We suggest this procedure for two reasons. First, there is a strong chance that the Secretary will not prevail on the substantive issue. Second, by delaying resolution of the remedial issues presented here for another year, the Court would be adding to the delays that have already prevented potentially meritorious claims from being approved for more than a decade.

A. Four Circuits Have Correctly Held that the Secretary's Regulations Violated the 1977 Amendments to the Act.

An analysis of the substantive issue suggests that there is a strong likelihood that the Secretary's position will be rejected in this Court, as it has been in four circuits. The essence of the Secretary's argument is that the 1977 Amendments, in requiring review of Part C claims under "criteria" that are not "more restrictive than the criteria" then applied to Part B claims, 30 U.S.C. § 902(f)(2), merely referred to "medical" criteria. Petitioners argue that the Secretary did promulgate regulations creating a presumption of disability due to pneumoconiosis based on medical evidence at least as generous as that previously accepted by the Social Security Administration in Part B cases. They further argue that it was legal for the Secretary to limit this presumption to miners with ten years of exposure even though the SSA presumption was not so limited, because this is not a "medical" issue.[17]

This argument is simply unconvincing. First, there is no substantial basis in the statute or its legislative history for defining the statutory term "criteria" solely in medical terms. The purpose of the requirement in the 1977 Amendments that the Secretary begin applying criteria no "more restrictive" than the SSA criteria was to "erase the perceived inequity of judging the validity of Part B (SSA) and Part C (Labor) claims by significantly different criteria." Solomons, "A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues," 83 W. Va. L. Rev. 869, 874 (1981). While part of the problem was the divergence between the existing SSA and Labor requirements for medical evidence,[18] the "most significant factor" was the "inapplicability of the interim presumption to Department of Labor claims." *Id.* at 873. *See Mullins*, *supra*, 108 S. Ct. at 437. In seeking to resolve this problem, Congress, far from focusing on "medical" standards, used a generic term intended to mandate essentially equivalent treatment of Part B and Part C claims.[19] Yet the Secretary has now adopted a reading of the statute that "would produce the anomalous result that in cases adjudicated [under Part B] the . . . presumption would apply, whereas in cases trans-

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[17] As described above, the Part B interim presumption was available to claimants who *either* had ten years of mine exposure *or* submitted evidence linking their disability to coal mine exposure. 20 C.F.R. § 410.490(b)(2), (3).

[18] This aspect of the problem was discussed in the legislative history. *See Strike*, *supra*, 817 F.2d at 403 (citing references). But as the Third Circuit has pointed out, "[r]eferences in debate to medical criteria are not dispositive [on the issue of what Congress meant by 'criteria'], since medical criteria are included" among the factors that had to be no "more restrictive." *Halon*, *supra*, 713 F.2d at 24.

[19] As one commentator has put it after reviewing the legislative history in detail, the goal was to mandate application of the entire SSA "interim presumption":

> Imposition of the "interim" presumption for use by DOL on Part C claims was done indirectly, in that the amending language required that the DOL regulations for review of pending and denied claims "not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 . . . ," meaning no more restrictive than the extremely liberal 20 C.F.R. section 410.490 "interim" regulations used by SSA after the 1972 amendments.

Lopatto, *supra* note 8, at 692 (footnote omitted).

ferred to the Secretary of Labor it would not." *Halon, supra*, 713 F.2d at 25. *See also Coughlan, supra*, 757 F.2d at 968. Such an outcome, as this Court has already suggested in *dictum* in *Mullins, supra*,[20] simply makes no sense in light of the statutory language and the goals that Congress sought to achieve.[21]

Indeed, even assuming that the term "criteria" could fairly be read to refer solely to *medical* criteria, petitioners' argument still would make no sense. If Congress mandated application of the same "medical criteria" in

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[20] In *Mullins*, the Court described section 902(f)(2) as referring to all aspects of the SSA presumption. *See* 108 S. Ct. at 430 ("The statute does require the Secretary to establish *criteria for eligibility* that 'shall not be more restrictive than' the criteria that the Secretary of HEW had established . . . .") (emphasis added); *id.* at 437 (referring to "Congress' demand that Labor's criteria 'shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973,' 30 U.S.C. § 902(f)(2), *i.e., no more restrictive than the SSA's interim presumption*") (emphasis added). (The Court's comment that the Labor presumption "satisfies" this requirement, *ibid.*, does not, of course, suggest that the Court considered and rejected all arguments concerning possible differences between the two presumptions.)

In addition, the Court in *Mullins* stated that various statutory Part B presumptions "apply indirectly to Labor claims as well" by virtue of the 1977 Amendments. 108 S. Ct. at 439 n.31. These statutory presumptions are not limited to "medical" criteria. *See* 30 U.S.C. § 921(c). This comment, therefore, further supports the view that the Amendments were intended to incorporate all aspects of presumptions applicable to Part B claims.

[21] Indeed, it can be argued that the Secretary's regulations themselves recognize the need to allow claimants the full benefit of the SSA interim presumption, by providing that, unless otherwise stated, any SSA regulations "which are not inconsistent with the 1977 amendments to the act, shall be applicable to the adjudication of claims" being reviewed by the Secretary. 20 C.F.R. § 727.4(b). *See also id.* § 727.200 ("[T]hese rules provide *additional* standards, not available in the [SSA] interim adjudicatory rules, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment.") (emphasis added).

Part C cases as were then applied in Part B cases, it can hardly have been legal for the Secretary to have promulgated comparable criteria but then made them totally inapplicable in an entire class of cases that would have been included under Part B. Obviously, the goal of Congress was not simply to force the promulgation of more generous "criteria" in the Code of Federal Regulations, but to have those criteria applied to claims under Part C as they had been under Part B.[22]

For these reasons, we think it is likely that if this Court grants full review on this statutory question it will reaffirm the position adopted by all but one of the circuits addressing the question. This forecast, we think, is an appropriate factor to consider in determining whether to defer the unique remedial issues raised in the present case, assuming that the Court determines that they are independently worthy of review.

B. Unnecessary Delays in the Relief to Be Awarded to the Proposed Class of Claimants in this Case Should be Avoided.

A second factor to consider is the delay that would be occasioned by two-step merits review of the questions presented here. All of the claimants in the proposed class in this case filed for benefits prior to 1981. Most filed in the early to mid-1970s. For some portion of this class, it is clear that the claims would have been approved long ago if they had been adjudicated under Part B by the SSA[23] or under Part C based on standards satisfying

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[22] Under the Secretary's reading, the Department could have complied with the statute by promulgating generous medical criteria but arbitrarily refusing to apply those criteria to every third case filed.

[23] As described above, claims filed after 1973 were all decided under Part C. But some claims filed prior to this time were ultimately decided under Part C due to administrative delays. When the 1977 Amendments were passed, pending Part B claims could

the statutory requirements. Thus, these claimants have been denied benefits inappropriately for a decade or more.[24]

In this factual context, if the Court is ultimately going to hear arguments on the right of respondents to seek to rectify this situation through an action in the nature of mandamus, those arguments should not be delayed for a year while the Court addresses solely the substantive issue. The more equitable and efficient approach, assuming the Court is disposed to resolve the circuit conflict on this substantive issue and is also concerned about the Eighth Circuit's remedial approach, is to grant this case and resolve all the pending issues simultaneously.

II. The Eighth Circuit's Jurisdictional Holding Was Correct.

While we are opposed to a "two-step" merits review of the questions presented here, we do not mean to concede that the second set of issues—involving remedial relief for the proposed *Sebben* class—is in fact independently worthy of review. To the contrary, the Eighth Circuit's

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be granted by SSA only if the evidence already in the file satisfied the governing requirements. 30 U.S.C. § 945(a)(1)(A). In all other cases, these pending claims were referred to the Secretary of Labor for a determination under the Part C interim regulations at issue here. *Id.* § 945(a)(1)(B), (2)(B), (3).

[24] Petitioners suggest that these claimants could now file for benefits under the post-1980 "permanent" standards. U.S. Pet. 12. *See* 20 C.F.R. Part 718. It is clear, however, that the current standards are much more restrictive than either the Labor or SSA versions of the interim standards applicable to claims filed prior to April 1, 1980. *See* Lopatto, *supra* note 8, at 694-95. Thus, relegating members of the proposed class to review under the current standards will mean that many will be denied benefits who were entitled to them under the earlier standards. Indeed, this fact is confirmed by the private petitioners dire predictions of fiscal catastrophe stemming from the decision below, Pet. 18-20, even assuming that the federal petitioners are correct in suggesting that these predictions are exaggerated, U.S. Pet. 12.

ruling that the district court had jurisdiction to compel the Secretary to perform the clear statutory duty to review pending and denied claims under revised criteria represents an appropriate disposition in the factual circumstances of this case and breaks no new ground. This ruling does not in any way threaten the basic administrative review process provided in the Act, because it applies only where, as here, Congress has created a separate, one-time right that cannot, by definition, be fully vindicated if individual claimants are required to utilize their administrative remedies.

In the 1977 Amendments, Congress created a carefully designed remedy for what it perceived as wholesale inappropriate denials of Part C claims due to overly restrictive regulations. That remedy was a program of reviews by the Secretary of the files of every denied or pending claim, applying criteria no "more restrictive" than the existing Part B interim standards. If such a review revealed that a claimant was eligible, the Secretary was directed to pay the claim immediately, on a retroactive basis. In direct contrast to the provisions in the 1977 statute concerning reconsideration of claims by the Secretary of Health and Human Services,[25] the language governing the Secretary of Labor made it clear that there was to be no requirement that claimants request a review or refile their claims. Congress determined that Part C claimants, having filed once and been faced with inappropriate denials, should not have to take any other steps in order to receive benefits under valid standards.[26]

As we have discussed, the key element in the reform mandated by Congress was application of the Part B in-

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[25] *See* 30 U.S.C. § 945(a)(1).

[26] As Congressman Perkins put it, the new law required "*automatic* review of all denied or pending claims in the light of the changes in the law made by this legislation." 124 Cong. Rec. 3426 (1978) (emphasis added).

terim presumption to claims that had previously been denied due to the absence of such a presumption in the original Part C regulations. Where the reform was allowed to work, it had the desired effect. Primarily because of the application of the presumption to claims of miners with more than ten years of exposure, Labor Department approval of claims increased dramatically.[27] However, with respect to the class at issue here—those without ten years of documented mining exposure in their files—the Secretarial reviews conducted after the 1977 Amendments were largely meaningless, since these claimants were categorically excluded from application of the interim presumption. In this sense, while the Department of Labor went through the motions of complying with the statute with respect to these claimants, it did not, as a practical matter, provide them with the key benefit that Congress mandated.

The gist of petitioners' argument is that the Secretary, having been instructed to review all files and pay benefits under the interim presumption without requiring claimants to take any further action, could instead deny this entitlement to a class of claimants and demand that they pursue administrative hearings and appeals in order to vindicate their statutory rights. For this class, under petitioners' theory, the Secretary was authorized to transform a right to *sua sponte* review under the interim presumption into a right to obtain application of that presumption only through clearly futile pursuit of the entire administrative process and an appeal to a court of appeals.[28] In effect, this theory means that the Secre-

[27] By 1978, the Labor Department had approved less than 5,000 Part C claims while rejecting 68,100 and leaving 52,000 still pending. Lopatto, *supra* note 8, at 691. By 1981, the Department had approved 89,400 Part C claims, some of which, of course, had been filed after 1978. *Id.* at 693.

[28] Because the restrictions on application of the interim presumption were contained in the Secretary's formal regulations, a claimant could not have won application of the interim presumption to his claim at any level of the process short of a court appeal.

tary had the power to rewrite the 1977 Amendments to require that one class of claimants—who had (1) already filed claims and (2) submitted evidence sufficient to justify relief under the revised standards—pursue three levels of review before they could hope to have the revised standards applied to their cases. For this class, there simply would be no real right to a nonadversarial, unrequested review of the existing files under the statutorily mandated standards, despite the express language of the 1977 Amendments.

The practical impact of the Secretary's conduct here was especially serious, since it was predictable that many eligible claimants, informed that their claims had been denied in Secretarial reviews, would not pursue those claims further. Many members of the proposed class, for example, had already had their Part C claims denied once under the more restrictive pre-1977 regulations. When informed by the Secretary that those same claims had been reviewed under the new, more generous 1977 Amendments and still found wanting, it was hardly likely that many such claimants would retain counsel and begin the administrative review process all over again. Indeed, this was the very problem that Congress sought to avoid by creating a right to an automatic review of all cases applying the new standards.

Faced with these circumstances, the Eighth Circuit held that this was an appropriate case in which to allow the district court to vindicate the right to a valid Secretarial review outside the statutory appeals process. Such a ruling, as a general matter, is hardly novel. In numerous cases, plaintiffs have been allowed to bypass administrative appeals and go straight to court if (1) they are asserting a right that is collateral to the issues assigned to administrative tribunals and (2) that right would be irretrievably lost or they would be otherwise irreparably harmed if forced to pursue the statutory process. In some cases, such as under the Social Security Act, juris-

diction for such claims is founded upon a specific grant within the substantive statute, but applicable exhaustion requirements and time limits are waived. *See Bowen v. City of New York*, 476 U.S. 467, 106 S. Ct. 2022, 2029-33 (1986); *Matthews v. Eldridge*, 424 U.S. 319, 326-32 (1976).[29] In other cases, "nonstatutory" review of administrative action is based on the general grants of jurisdiction in 28 U.S.C. § 1331 (general federal question jurisdiction)[30] or 28 U.S.C. § 1361 (mandamus).[31]

In sum, it is well established that in "exceptional situations . . . a litigant [may] invoke the equitable powers of a district court to preserve a substantial right from irretrievable subversion in an administrative proceeding" without pursuing statutory appeals. *Nader v. Volpe*, 466

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[29] Under the Social Security Act, reliance on the specific grant of jurisdiction in the Act is the result of the fact that the statute itself arguably precludes reliance on general jurisdictional statutes. *See* 42 U.S.C. § 405(h). *But see Ellis v. Blum*, 643 F.2d 68, 77-78 (2d Cir. 1981) (procedural claims may be litigated under mandamus jurisdiction); *Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984) (statutory claims that cannot be asserted through other avenues may be litigated through mandamus).

[30] *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 187-91 (1958) (nonstatutory review in district court of NLRB certification order allowed because Board action deprived plaintiffs of a statutory right that they could not enforce through statutory review procedures); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773-74 (1947) (sufficient showing of "inadequacy of the prescribed procedure and of impending harm [may] permit short-circuiting the administrative process"); *id.* at 774 (exhaustion rule does not apply where "the prescribed remedy . . . will . . . certainly or probably result in the loss or destruction of substantive rights"); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 142-43 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342, 343-45 (D.C. Cir. 1965).

[31] *See, e.g., Ganem v. Heckler*, 746 F.2d 844 (D.C. Cir. 1984); *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981).

F.2d 261, 269 (D.C. Cir. 1972). Indeed, this principle has been recognized even in decisions under the Black Lung Benefits Act that have held that the availability of a statutory appeals process under the Act generally precludes actions brought outside that process. *See Louisville & Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) ("in narrow circumstances some residuum of federal question subject matter jurisdiction may exist in the United States District Court"); *Compensation Department of District Five, United Mine Workers v. Marshall*, 667 F.2d 336, 343 (3d Cir. 1981) ("If the remedies provided for in the statutory scheme of review are inadequate in a particular case, an argument can be made that Congress did not intend to forbid the district courts from taking jurisdiction.") The decision below simply applied this principle, based on the conclusion that in the unique circumstances of this case, the Secretary had denied claimants a right that could not, in principle, be vindicated if those claimants were required to pursue the administrative process on an individual basis.

In this case, the jurisdictional theory asserted by respondents, and accepted by the court below, was "nonstatutory" review under section 1361, the mandamus statute. The decision to assert a jurisdictional basis wholly independent of the Black Lung Benefits Act was required here because the particular grant of jurisdiction provided for "statutory" appeals under the Act was not appropriate or even available. The administrative process for black lung claimants is based, through express incorporation,[32] on the Longshore and Harbor Workers' Compensation Act, which provides for appeals by claimants to the courts of appeals from "final orders" of the Benefits Review Board. 33 U.S.C. § 921(c).[33]

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[32] *See* 30 U.S.C. § 932(a).

[33] The Act provides for district court jurisdiction solely over claims to enforce compensation orders. *Id.* § 921(d).

Here, there could be no final order of the Board if respondents were to vindicate their right to receive a valid review of their files without having to litigate, or relitigate, their claims themselves. Moreover, the courts of appeals arguably could not vindicate the right at issue because they could only adjudicate individual, not class, claims.

Respondents' reliance on section 1361—rather than the general jurisdiction and equitable powers of the district courts—was also appropriate, although perhaps not mandatory.[34] Actions "in the nature of mandamus" may be brought where, as here, they seek to vindicate clear rights that could not be effectively asserted in alternative statutory review procedures. *See, e.g., City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984), *aff'd on other*

[34] The decision to rely on mandamus was motivated by the fact that the Black Lung Benefits Act precludes application of the judicial review provisions of the Administrative Procedure Act—provisions that are usually cited in tandem with the general jurisdictional statute, 28 U.S.C. § 1331, in actions seeking review of administrative agencies. *See* 30 U.S.C. § 956. However, even in the absence of the APA, there is authority for the view that the district courts retain general equitable powers to review clearly illegal actions of federal officials for which there is no other appropriate remedy. *See, e.g., Olegario v. United States*, 629 F.2d 204, 224 n.9 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 142-43 (D.C. Cir. 1971). *See generally* Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Administrative Action," 81 Harv. L. Rev. 308, 321-26 (1967). The decision below thus could be upheld without reaching any questions concerning mandamus jurisdiction. *See Ganem v. Heckler*, 746 F.2d 844, 848-49 (D.C. Cir. 1984) (where mandamus jurisdiction is asserted, court must consider other possibilities "both because 'we are sensitive to an obligation to explore any promising avenue to the District Court's jurisdiction, whether or not suggested by the parties,' . . . and because, to determine whether mandamus jurisdiction is available, we must first determine whether there are any other available routes through which federal jurisdiction could be exercised . . . .") (citation omitted).

grounds, 476 U.S. 467 (1986); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 968-69 (8th Cir. 1983); *Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983). Mandamus provides a remedy for a plaintiff "if he has exhausted all other avenues of relief and . . . if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Here, as we have discussed, there was no administrative proceeding that could vindicate respondents' right to receive valid *sua sponte* reviews of their cases. Moreover, the Secretary's obligation to conduct such reviews, under standards no "more restrictive" than those previously applied in Part B cases, was explicitly set out in the statute and plainly nondiscretionary.[35]

Petitioners attempt to foreclose mandamus relief here in several ways. First, they argue that, even if the Secretary's actions are illegal, such a finding of illegality depends on interpretation of a statute and thus is not sufficiently "clear" to justify mandamus relief. This argument, however, is based on citations to old cases that do not reflect the prevailing rule. Numerous more recent cases hold that, while mandamus is restricted to enforcement of clear legal duties, a court may interpret a statute in determining whether such a duty exists. *See Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Naporano Metal & Iron Co. v. Secretary of Labor*, 529 F.2d 537, 542 (3d Cir. 1976) (granting mandamus to enforce statute even though Secretary's conduct, as here, conformed with regulations interpreting that statute); *Mattern v. Weinberger*, 519 F.2d 150, 156 (3d Cir. 1975), *vacated and remanded on other grounds*, 452 U.S. 987

[35] As Congressman Perkins put it, every claimant was "*absolutely entitled* to review" conforming with the 1977 Amendments. 124 Cong. Rec. 3426 (1978) (emphasis added).

(1976). Thus, while mandamus review of administrative action may be narrower than usual administrative review in a case premised solely on ~~an alleged~~ "abuse of discretion," a court has the power to act in either case when it determines that an agency has acted contrary to governing law.[36]

Petitioners also argue that mandamus relief is barred because respondents and members of the proposed class failed to pursue administrative appeals, within the time provided by statute, when they were notified that the reviews of their claims had resulted in denials. This argument, however, simply misunderstands the basis of the decision below. The Eighth Circuit's approval of mandamus relief in this case was premised on the conclusion that the statutory administrative review process was not an available means of vindicating respondents' right to a valid Secretarial review of their claims. As we have discussed, if individual claimants were required to pursue that process to its conclusion in the courts of appeals in order to have the interim presumption applied to their claims, they would already have lost the right that Congress created for them—the right to have their existing claims reviewed and reconsidered under revised standards without having to relitigate them themselves. If this conclusion is valid, it follows that the exhaustion and timeliness requirements cited by petitioners are simply irrelevant, because they apply to a particular statutory procedure that respondents could not, and need not, invoke.

Finally, petitioners suggest that the relief ordered by the court below violates principles of *res judicata* because it has the effect of reviving claims that were previously closed by virtue of claimants' failure to pursue administrative appeals. This argument is again answered by the fact that the right at issue—the right to a

[36] *See* 4 K. Davis, *Administrative Law Treatise* § 23:13 (2d ed. 1984).

valid Secretarial review of existing files—is not a right that could be effectively vindicated through such appeals. In this context, a *res judicata* argument is just as misplaced as it was in *Bowen v. City of New York, supra*, where this Court authorized judicial enforcement of the collateral right to a valid first-level disability review on behalf of Social Security claimants who had failed to pursue administrative relief. *See* 106 S. Ct. at 2031. There, as here, the right at issue was one that could not have been vindicated in the administrative process and claimants would have been irreparably harmed if they had been required to go through the meaningless exercise of a full administrative review.[37] And, while the jurisdictional basis of the claims approved in *City of New York* was a specific provision of the Social Security Act rather than the mandamus statute, the applicable standards for determining when a plaintiff may sue to vindicate a collateral right despite a previous failure to pursue administrative appeals are, as we have discussed, essentially the same under either jurisdictional theory.

For all of these reasons, we believe that the Eighth Circuit's decision to allow a mandamus remedy for the unique legal violations at issue here was both correct and well within the boundaries of many previous rulings. It follows that the remedial questions raised in both petitions are not independently worthy of review by this Court.

[37] In *City of New York*, the irreparable harm was primarily injury caused to mentally ill disability claimants by erroneous denials at the initial decisionmaking stage. 106 S. Ct. at 2032. Here, by contrast, the irreparable harm stems from the fact that if claimants did pursue administrative appeals they would lose their essentially procedural right not to have to litigate a valid claim twice. In this sense, the harm here is more comparable to that discussed in *Matthews v. Eldridge, supra*, which involved a constitutional claim of a right to predeprivation hearing—a claim that could not in principle be vindicated through subsequent administrative appeals. *See* 424 U.S. at 330-31.

CONCLUSION

The petitions should either be held pending disposition of the substantive statutory issue in another case or, if the Court deems the remedial issues independently worthy of review, should be granted to allow simultaneous disposition of all the questions presented.

Respectfully submitted,

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(4) (3)

Nos. 87-821, 87-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, *et al.*,
Petitioners,

v.

JAMES SEBBEN, *et al.*,
Respondents.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

JAMES SEBBEN, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN INSURANCE ASSOCIATION AND NATIONAL COUNCIL ON COMPENSATION INSURANCE IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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BRIEF AMICI CURIAE OF THE AMERICAN INSURANCE ASSOCIATION AND NATIONAL COUNCIL ON COMPENSATION INSURANCE IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

Amici curiae,[1] the American Insurance Association and the National Council on Compensation Insurance respectfully request that the Court grant the Petitions

1. In accordance with Rule 36.1, the written consent of the Pittston Coal Group, *et al.*, the Solicitor General, and James Sebben, *et al.*, are being submitted herewith.

for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 25, 1987.

INTEREST OF AMICI CURIAE

The American Insurance Association (hereinafter "AIA") is an independent, not-for-profit insurance industry trade association whose membership is composed of approximately 200 property-casualty insurance companies and their subsidiaries. AIA provides a variety of services to its members and, from time to time, represents their collective interests in the course of litigation of special significance.

The National Council on Compensation Insurance (hereinafter "NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes over seven hundred insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout the United States. In thirty-five states, including most major coal mining states, NCCI proposes and administers premium rates and rating plans for workers' compensation insurance. NCCI also manages the National Workers' Compensation Reinsurance Pool (hereinafter the "Pool"). The Pool reinsures several categories of risk that arise under the federal Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1986) (hereinafter the "Act"). In particular, the Pool is the only commercial insuring vehicle available to small and high risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from an

insurance carrier. NCCI's members and many AIA members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, from 15-20% of all federal claim liabilities are insured or reinsured by the Pool.

The Pool, NCCI's members, and AIA's members have voluntarily made commercial insurance available to mine operators for their liabilities arising under the federal Act. While mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by the U.S. Department of Labor and was asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[2] Given repeated assurances by the Department and the Congress during the period from 1973 to the present day that the black lung claims process would, notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, coverage has been made continuously available at affordable rates. As a result of pervasive liberalizations of entitlement criteria in the Black Lung Benefits Reform Act of 1977, Pub. L. No.

2. *Hearings on H.R. 10760 and S. 3183 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

95-239, 92 Stat. 95 (1978),[3] it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress, worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[4] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund,* 97th Cong., 1st Sess. 16, 30 (Comm. Print 1981); *see also,* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing ... this retroactive liability.... [T]he combined effect of the 1977 law requiring the automatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and

3. In 1977 provisions, Congress directed the review of all pending and previously denied black lung claims under greatly liberalized eligibility standards, 30 U.S.C. §§ 902(f)(2), 945. The Department of Labor's regulatory implementation of those standards is the central subject of this litigation.

4. This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981). But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers' tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 30 U.S.C. § 934. The Fund is currently over $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

The decision of the Eighth Circuit demands a replay of the 1977 amendments. It requires the Secretary of Labor to reopen approximately 94,000 closed claims[5] which were previously denied under the exceptionally generous eligibility criteria adopted by the Secretary following the 1977 amendments to the Act, and to readjudicate them under a different set of eligibility regulations. The eligibility standards mandated for use in these cases by the Eighth Circuit are set forth in regulations promulgated by the Social Security Administration (hereinafter "SSA") in 1972 (20 C.F.R. § 410.490 (1987)). The SSA rule does not, by its plain language, apply to Department of Labor claims. The Department of Labor's rules are at 20 C.F.R. § 727.203 (1987). Both rules establish a rebuttable presumption of eligibility for benefits under the Act. The SSA presumption is more easily invoked in some cases, but, according to the circuits, is not generally rebuttable. Section 410.490 is rebutted only if the miner "is either doing or capable of doing his usual coal mine work" whether or not the inability to work is black-lung related. *Broyles* v. *Director, Office of Workers' Compensation Programs,* 824 F.2d 327, 329 (4th Cir. 1987), *petition for cert. filed,* (Dec. 29, 1987) (No. 87-1095). "Section 410.490 cannot be rebutted by medical evidence." *Cook* v. *Director,*

5. The Petition for a Writ of Certiorari filed by the Solicitor General in No. 87-827 at 11 suggests this figure. Other data compiled by the Congress in 1981 suggest that approximately 155,000 claimants would be within the class to be certified. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office, Sam Church, Jr., President, United Mine Workers of America, Charles Coakley, AIA).

Office of Workers' Compensation Programs, 816 F.2d 1182, 1185 (7th Cir. 1987). By contrast, the Labor Department's presumption may be rebutted by the defendant if the relevant medical proof establishes that the miner is not totally disabled by, or does not suffer from, or did not die due to black lung disease. 20 C.F.R. § 727.203(b); *see Mullins Coal Co., Inc. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 432 (1987). Section 410.490, as it has been interpreted, provides benefits whether or not a miner's absence from the workplace is caused by black lung disease, and in some instances, whether or not the miner actually suffers from this occupational disease. *See Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185; *compare* 20 C.F.R. § 410.490(c) *with* 20 C.F.R. § 727.203(b).

Thus, as amici see it, the Eighth Circuit's mandate requiring the application of section 410.490 in tens of thousands of previously denied and closed cases completely revises the premise upon which federal black lung insurance was offered to the mining industry. It is a betrayal of the promises reflected in the statute and in the longstanding and consistent representations made by Congress and the federal agencies. In offering this insurance, the insurance industry did not, was not asked to, and surely would not have made federal black lung benefit coverages available to pay benefits on account of the non-occupational disabilities or the retirement of coal miners. It would not have provided an insurance product guaranteeing the payment of claims where the meaningful right to defend those without merit is largely precluded. The Eighth Circuit's decision, if it

stands, has rewritten not only the law, but our insurance contracts as well to these effects.

Amici have a direct, substantial, and dramatic interest in this matter.

REASONS FOR GRANTING THE WRITS

1. This subject matter has generated five pending petitions for certiorari.[6] We need not detail the several grounds supporting certiorari set forth by the Solicitor General and the other petitioners. There is a division in authority in the circuits. This split directly and immediately affects the ten thousand or so pending claims potentially subject to adjudication under section 410.490, *see Mullins Coal Co., Inc. of Virginia*, 108 S. Ct. at 430, and puts in jeopardy the status of nearly one hundred thousand others, many of which were closed long ago. The Eighth Circuit's decision vastly exceeds the jurisdictional boundaries of 28 U.S.C. § 1361 and impermissibly abrogates principles of res judicata. It raises questions, noted by both the mine owner and insurance carrier petitioners as well as the Solicitor General, concerning the constitutional adequacy of the eligibility standards embraced by the court below.[7]

6. In addition to these two petitions, petitions for certiorari have been filed in *Director, Office of Workers' Compensation Programs* v. *Charlie Broyles*, (U.S. Dec. 29, 1987) (No. 87-1095); *Director, Office of Workers' Compensation Programs* v. *Fred Kyle*, (U.S. Dec. 21, 1987) (No. 87-1045); and *National Council on Compensation Insurance* v. *Fred Kyle*, (U.S. Dec. 21, 1987) (No. 87-1065).

7. The constitutional problem presented is underscored by this Court's observation in *Mullins Coal Co., Inc. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. at 440 n.32, that "[t]here is some question whether pneumoconiosis, for example, can be considered 'proved'—and therefore serve as the constitutional predicate for presuming ultimate facts—if evidence tending to disprove pneumoconiosis is not permitted to be considered on invocation." Under section 410.490, total disability due to pneumoconiosis is presumed on the basis of evidence that cannot prove this set of facts, but the

And finally, on the merits, the Secretary of Labor's regulation, 20 C.F.R. § 727.203, does not depart from the mandate of the Act at 30 U.S.C. § 902(f).

2. Of more immediate concern to amici is the potential economic chaos that would surely follow a wholesale readjudication of closed claims under section 410.490, as well as its application to thousands of active claims. NCCI, which is in the business of evaluating risks, has devoted considerable resources to an examination of the impact and implications of the decision below. The exercise is a difficult one given the variable factors that naturally arise in individual claims and the differing applications of section 410.490 that have evolved in the circuits.

Under the more conservative set of assumptions, it is estimated that relitigation of all claims in the putative class identified by the Eighth Circuit will add from two to four billion dollars in benefit liabilities to the obligations of the Black Lung Disability Trust Fund and from one to two billion dollars in liabilities to the obligations of individual mine owners, the Pool, and other insurers, exclusive of administrative and litigation costs.[8] The

evidence tending to disprove the presumed facts is legally irrelevant and cannot be considered at all, at least in the Third Circuit, *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922, 924 (3d Cir. 1987), and the Fourth Circuit, *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 829-30. The Eighth Circuit has not yet decided the rebuttal question but it is pending. *Consolidation Coal Co.* v. *Smith*, No. 86-2397 (argued Oct. 16, 1987).

8. The Secretary's Petition for a Writ of Certiorari at 12 suggests that a re-review might not change the result in many cases, reasoning that the presumption would be rebutted with frequency. While there is logic to the statement, we think it is divorced from reality. The Department of Labor never made any significant effort to rebut its own presumption and this is well documented. *See* Comptroller General of the U.S., *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (1982). As to rebuttal by employers, there is little evidence that this is a reasonable prospect. The section 410.490 presumption is a rule of evidence of exceptional

aggregate costs of administration and litigation of tens of thousands of claims would surely add hundreds of millions of dollars to the estimates. A worst case model, in which rebuttal under section 410.490 is virtually impossible and in which the benefit of section 410.490 is extended to include miners with more than ten years of coal mine employment, could double these estimates.[9]

While circumstances such as these easily lend themselves to overstatement, the simple fact of the matter is that the Eighth Circuit's decision mandates a result that is inequitable and unaffordable. It interprets the scope of the federal black lung statute far beyond its intended purpose and makes a mockery of fundamental defensive rights. It advances the proposition that the insurance industry was imprudent in placing reasonable reliance upon Congress's and a federal agency's longstanding assurances that the new risks they created would be predictable and thus commercially insurable.

The Eighth Circuit's decision is intolerable, not only for these reasons, but for the precedent it sets for any future time the Congress creates an entirely new risk of loss that must be funded through commercial insuring arrangements.

force that as of December, 1980 produced $9 billion in benefits to claimants in a program that existed for only 3½ years. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, supra*, n.5 at 3 (testimony of Morton E. Henig, U.S. General Accounting Office). Amici have no confidence and no reason to believe that this truly remarkable provision can be applied in a way that permits a fair hearing on the merits in any case.

9. Logically, section 410.490 would almost surely be applied in these cases involving ten or more years of employment. There is no basis upon which it would be proper to treat longer term miners less favorably than short term miners. Clearly, the Fourth Circuit would apply section 410.490 in all claims filed before April 1, 1980. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329.

CONCLUSION

Amici urge the Court to grant these petitions.

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No. 87-821

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

Pittston Coal Group, Barnes & Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company, Pennsylvania National Insurance Group,
Petitioners,

v.

James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, William Brock, III, Secretary, United States Department of Labor, Steven Breeskin, Deputy Commissioner, United States Department of Labor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus Curiae National Coal Association respectfully submits that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed in this proceeding on March 25, 1987 should be granted.

Pursuant to Rule 36 of the Rules of this Court, the parties to this case have by letters consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE NATIONAL COAL ASSOCIATION

The National Coal Association ("NCA") is a trade association comprising approximately 325 members. NCA directly or indirectly represents over 90 percent of the nation's coal production. In addition to coal producing companies, NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, electric utilities, and resource developers.

NCA producer members, and all other U.S. coal producers are responsible for the payment of benefits to eligible claimants under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"), in two direct ways: (1) as individual coal mine operator defendants in certain black lung cases, 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF"), 26 U.S.C. § 4121. The BLDTF is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2). The BLDTF is used to pay black lung compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which a responsible coal operator defendant cannot be identified, 26 U.S.C. § 9501(d). The BLDTF also pays the costs of the Departments of Labor, Treasury, and Health and Human Services in administering the black lung program. Those costs currently amount to over $48 million in 1987.[1]

[1] U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1987) (available through the U.S. Treasury Department) [hereinafter cited as *1987 Trust Fund Status Report*].

Earlier this term, in *Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers Compensation Programs,* 108 S. Ct. 427 (1987), this Court effectively provided black lung claim defendants with a fair opportunity to challenge the reliability of a black lung claimant's evidence at the point in the proceeding where it was relevant to do so. As a result of the *Mullins* case, it is clear that this traditional right is secured not only by the Black Lung Benefits Act, but by the invocation language of the eligibility regulation there at issue, 20 C.F.R. 727.203 (1987). Section 727.203 is the Department of Labor's "interim presumption." It was applied or was available for application in each of the thousands of cases falling within the putative class identified by the Eighth Circuit in this case. But, the Eighth Circuit holds that a different "interim presumption" promulgated by the Social Security Administration must be applied, in these cases, *i.e.,* 20 C.F.R. 410.490 (1987). While the two presumptions may produce the same result in many cases, on invocation, section 410.490, which is neither designed nor intended for application in adversarial litigation, appears to be largely irrebuttable. The Eighth Circuit's substitution of section 410.490 for section 727.203, which is difficult to rebut *but rebuttable,* effectively defeats the effect of the *Mullins* case. The Eighth Circuit's decision again precludes the seemingly fundamental premise that mine owners are entitled to a fair opportunity to defend claims in which the miner is not totally disabled due to black lung disease. The coal industry must, therefore, return to this Court to seek a restoration of these elementary rights.

ARGUMENT

THE QUESTION PRESENTED IN THE PETITION IS OF GREAT IMPORTANCE TO THE COAL MINING INDUSTRY OF THE UNITED STATES

NCA strongly supports and endorses the arguments as set forth by Petitioners[2], and urges the Court to grant a writ of certiorari in the instant proceeding for the following reasons.

1. Even under conditions existing prior to the Eighth Circuit opinion, the BLDTF has been chronically insolvent.

The tax paid by coal producers into the BLDTF is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal, 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $3.975 billion in tonnage taxes from coal producers since 1978.[3] In fiscal year 1987, the nation's coal producers paid $572,295,000 into the BLDTF in tonnage taxes[4].

Despite these substantial tax revenues there has been a continuing shortfall between black lung payment obligations of the BLDTF and the income from the producers' tax. Indeed, the BLDTF has paid out over $5.54 billion in compensation since 1978,[5] and in fiscal year 1987, disbursed $605 million in compensation.[6] The massive growth in BLDTF liability is to a substantial degree attributable to the approval of approximately 120,000 previously denied claims by the Department of Labor (and to a lesser extent, the Social Security Administration) under the requirements of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95, (1978) including the 20 C.F.R. § 727.203 interim presumption.[7] The approval rate greatly *exceeded* all congressional projections.[8]

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[2] This brief is also offered in support of the Solicitor General's Petition for a Writ of Certiorari, *Whitfield v. Sebben, petition for cert. filed,* 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-827).

[3] Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985)[hereinafter cited as 1985 Joint Comm. on Taxation Summary]; and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Dec. 7, 1987).

[4] *1987 Trust Fund Status Report, supra* note 1.

[5] *See supra* not 3. This does not include costs of administration.

[6] *1987 Trust Fund Status Report, supra* note 1.

[7] Office of Workers Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Department of Labor) [hereinafter cited as *1987 Black Lung Claims Status Report*]. From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously-denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 [hereinafter the 1978 Amendments] and referred to the Secretary of Labor for payment from the Fund, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF because of the 1978 Amendments totals approximately 120,000. *1987 Black Lung Claims Status Report, supra.*

[8] H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1978 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W. Va. L. Rev. 677,691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 97th Cong. 1st Sess. 23 (Comm. Print 1981).

2. This insolvency has led to a substantial increase in coal industry tax liability to stabilize the BLDTF.

To try to meet the shortfall between compensation levels and BLDTF revenue, the producers' tax has been increased twice from the 1978 rate of $.50 per ton on underground coal and $.25 per ton on surface-mined coal.[9] In 1981, the tax was increased 100% to $1.00 per ton (underground) and $.50 per ton (surface).[10] In 1985, The Administration proposed to again raise the tax, this time by 50%. Congress, however, acknowledging the coal industry *was in financial difficulty and should not be saddled with added black lung taxes, enacted only a 10% tax increase to reach the current levels of $1.10 per ton (underground) and $.55 per ton (surface).*[11]

In addition to the two tax increases, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. These advances must be repaid by the BLDTF to the general treasury, with interest. 26 U.S.C. §§ 9501(c), (d)(4)[12]. The present cumulative debt of the BLDTF in unpaid ad-

[9] Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a) § 92 Stat. 11 (1978).

[10] Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981).

[11] *See* remarks of Senators Heinz and Warner, 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985). Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), 100 Stat. 312 (1986) [hereinafter cited as 1986 BLDTF Amendment]. 26 U.S.C. §§ 4121(a), (b).

[12] The 1986 BLDTF Amendment placed a five-year moratorium on interest accruals with respect to advances to the BLDTF, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (Apr. 7, 1986).

vances and interest is approximately $2.948 billion, of which $1.032 billion is interest on advances as accumulated.[13]

Under a 1981 amendment to the Internal Revenue Code[14], the producers' tonnage tax was to revert to the lower 1978 rate by January 1, 1996, or when there was neither a balance of repayable advances nor interest owed by the BLDTF, whichever date was earlier.[15] However, even before the Eighth Circuit decision, the ability of the BLDTF to achieve solvency by 1996 was dubious.[16] When the Administration attempted to increase the tax by fifty percent in 1985, the Department of Labor predicted that the advance and interest necessary to meet BLDTF obligations could reach $30 billion by the year 2010. H.R. Rep. No. 241, 99th Cong., 2d Sess., pt. 1 at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-54. Congress, in 1987, recognized the inability of the Trust Fund to meet its obligations. Although it rejected the President's proposal in his Fiscal Year 1988 Federal Budget to increase the tax on producers to raise $400 million in additional

[13] *See supra* note 3.

[14] Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 102(a), 95 Stat. 1635 (1981).

[15] 26 U.S.C. § 4121(e), *as amended by* the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313 (Apr. 7, 1986) (prior to amendment of Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 99-203 § 10503 (Dec. 22, 1987)).

[16] 1985 Joint Committee on Taxation Summary *supra* note 3; and based on information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Department of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

revenues,[17] it still imposed an additional burden on producers.

Congress extended the date by which the producers' tonnage tax is to revert to the lower 1978 rate by an additional 18 years, *i.e.*, until January 1, 2014.[18]

3. The Eighth Circuit's decision could severely exacerbate the financial difficulties of the BLDTF in a way NCA believes Congress did not intend.

The chronic insolvency of the BLDTF arises as a result of the exceptionally generous entitlement formula contained in the Department of Labor's interim presumption, *i.e.*, section 727.203. Coal tax increases and the executive branch's requests to Congress for still larger increases arise solely within this context. None of the proposals were generated by any expectation or belief that the BLDTF needed revenues sufficient to pay Department of Labor claims under the eligibility rules of section 410.490.

The Eighth Circuit's decision will, to a fairly high degree of certainty, exacerbate the financial difficulties of the BLDTF well beyond the coal industry's ability to respond. It will also add significantly to the direct liability of individual mine owners. These circumstances arise, in NCA's view, on the premise reflected in the Eighth Circuit's decision, that these statutory benefits should be

[17] Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988*, at 2-41. If enacted, this revenue proposal would have meant an increase of the tax to approximately $1.75 per ton on underground coal and $.88 per ton on surface-mined coal.

[18] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203 § 10503 (Dec. 22, 1987), *amending* 26 U.S.C. § 4121(e)(2).

available whether or not the miner really has black lung disease or is disabled for work as a result of the disease. NCA does not believe that Congress intended this result, that the Eighth Circuit was correct in reaching it, or that this incorrectly perceived intent is properly applied retroactively in cases which were litigated and closed long ago.

Tens of thousands of claims meaning billions of dollars in liability could arise from the certified class.[19] At this level black lung disability is essentially unfunded for the insured and self-insured coal producer as well as for the BLDTF.

As with the first review of pending and denied claims after the 1978 amendments, the lion's share of the burden resulting this case will borne by the BLDTF. A Department of Labor claims examiner's approval of a claim to be paid from the BLDTF is effectively *the last word as no third party can challenge the approval administratively or before a federal court.*

Increased revenues will thus be needed at a time when the BLDTF is already in an exceedingly precarious financial state, *and* when the Congress has acknowledged that the coal industry should not be burdened with further new black lung taxes. The Eighth Circuit's decision will not only impede the return of the producer's tax to a lower level,

[19] Both the Solicitor General in his Petition for a Writ of Certiorari at 11, *Whitfield v. Sebben, petition for cert. filed,* 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-827) and Petitioners in the instant case, in their Petition for a Writ of Certiorari at 3, *Pittston Coal Group v. Sebben, petition for cert. filed,* 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-821) suggest a figure of approximately 94,000 closed claims. This estimate does not take into consideration pending claims. Petitioners in the instant case estimate between $4.7 billion and $13.6 billion in indemnity benefits as a result. *Id.* at 19.

and most likely contribute to a perpetual BLDTF deficit requiring additional Treasury advances and concomitant tax increases.

CONCLUSION

The Eighth Circuit's decision below is wrong for the reasons set forth in Petitioners' Brief and would impose substantial unwarranted burdens on the coal industry. Therefore, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

BRIEF FOR THE PETITIONERS PITTSTON COAL GROUP, BARNES AND TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY AND PENNSYLVANIA NATIONAL INSURANCE GROUP

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QUESTIONS PRESENTED

1. Does the United States Department of Labor's black lung eligibility presumption published at 20 C.F.R. § 727.203 (1987) violate section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), because it contains certain evidentiary rules that are less favorable to black lung claimants than the Social Security Administration's black lung eligibility presumption published at 20 C.F.R. § 410.490 (1987).

2. If 30 U.S.C. § 902(f)(2) requires application of the Social Security Administration presumption in claims involving the individual liability of coal mine operators, does 30 U.S.C. § 902(f)(2) violate the due process of law guarantees of the Fifth Amendment to the United States Constitution.

3. If 30 U.S.C. § 902(f)(2) requires the Secretary of Labor to adopt the Social Security Administration rule and passes constitutional muster, does 28 U.S.C. § 1361 confer jurisdiction on the United States courts to require the Secretary of Labor to reopen and readjudicate tens of thousands of previously denied claims otherwise barred by the Longshore Act and res judicata.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Numbers 87-821 and 87-827 arise out of a suit for class certification and mandamus filed in the United States District Court for the Southern District of Iowa. James Sebben, John Cossolotto, Bruno Lenzini and Charles Tonelli were the plaintiffs and purported class representatives in the district court and appellants in the Eighth Circuit. Each plaintiff was an applicant for benefits under the Black Lung Benefits Act. Ann McLaughlin is the Secretary of Labor; Steve Breeskin is an employee of the United States Department of Labor having certain administrative responsibilities in connection with the black lung program. Secretary McLaughlin and Mr. Breeskin were defendants in the district court and appellees in the court of appeals.

In the Eighth Circuit, the Pittston Coal Group, Barnes and Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company and the Pennsylvania National Insurance Group sought and were granted leave to intervene as indispensable parties on the side of the federal parties.

Intervenors are the petitioners in No. 87-821 and the Department of Labor officials are the petitioners in No. 87-827.

In No. 87-1095, Charlie Broyles and Lisa Kay Colley are separate claimants for benefits under the Black Lung Benefits Act. Both were petitioners in the Fourth Circuit seeking relief from denials of benefits in prior administrative proceedings. The Director, Office of Workers' Compensation Programs, United States Department of Labor, defended both claims on behalf of the Black Lung Disability Trust Fund and was the respondent in the Fourth Circuit. The Director is the petitioner in this Court.

The Barnes and Tucker Company and the Pennsylvania National Insurance Group are independent corporate entities without relationships that must be listed under Rule 28.1 of the Rules of the United States Supreme Court. The Pittston Coal Group is a wholly owned subsidiary of the Pittston Companies. The Island Creek Coal Company is a wholly owned subsidiary of the Occidental Petroleum Corporation. The Consolidation Coal

Company is a wholly owned subsidiary of the E.I. du Pont de Nemours & Company. The Old Republic Insurance Company is a wholly owned subsidiary of the Old Republic International Corporation.

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Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

BRIEF FOR THE PETITIONERS PITTSTON COAL GROUP AND CO-PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 815 F.2d 475 (Pet. App. 1a).[1] The Eighth Circuit's orders denying rehearing are unreported (Pet. App. 17a-18a). The orders of the Eighth Circuit granting intervention are unreported (Pet. App. 19a-20a). The district court's order granting the Government's motion to dismiss for lack of subject matter jurisdiction is unreported (Pet. App. 21a).

1. The Solicitor General's motion to dispense with the printing of the joint appendix in Nos. 87-821 and 87-827 was granted on March 21, 1988. Citations to the Petitioners' Appendix ("Pet. App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari filed by the Pittston Coal Group and its co-petitioners in No. 87-821.

The opinion of the Fourth Circuit is reported at 824 F.2d 327 (Broyles App. 1a).[2] The Fourth Circuit's order denying rehearing is unreported (Broyles App. 29a). The decisions of the Benefits Review Board, United States Department of Labor, and of the administrative law judge are unreported (Broyles App. 7a-28a).

JURISDICTION

In Nos. 87-821 and 87-827, the decision of the Eighth Circuit was filed on March 25, 1987. Timely petitions for rehearing filed by the Government and on behalf of intervenors were denied on June 25, 1987 (Pet. App. 17a) and July 24, 1987 (Pet. App. 18a), respectively. On September 17, 1987, Justice Blackmun signed orders extending the time for both the Government and intervenors to file a petition for a writ of certiorari to and including November 20, 1987 (Pet. App. 24a).

In No. 87-1095, the decision of the Fourth Circuit was filed on July 31, 1987 (Broyles App. 1a). A timely petition for rehearing was denied on September 30, 1987 (Broyles App. 29a). Jurisdiction was conferred on the Fourth Circuit by the filing of a timely petition for review of a decision of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c), *incorporated into* 30 U.S.C. § 932(a).

The jurisdiction of this Court is invoked in these cases under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following authorities are printed in the Petitioners' Appendix:

1. U.S. Const. amend. V (Pet. App. 25a)
2. 5 U.S.C. § 553 (Pet. App. 25a)
3. 30 U.S.C. § 902(f) (Pet. App. 27a)

2. The Solicitor General's motion to dispense with the printing of the joint appendix in No. 87-1095 was granted on May 2, 1988. Citations to the Broyles Appendix ("Broyles App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari filed by the Solicitor General in No. 87-1095.

4. 30 U.S.C. § 932(a) (Pet. App. 28a)
5. 33 U.S.C. § 919 (Pet. App. 29a)
6. 33 U.S.C. § 921 (Pet. App. 31a)
7. 20 C.F.R. § 410.490 (1987), The Social Security Administration "Interim Presumption" (Pet. App. 34a)
8. 20 C.F.R. § 727.203 (1987), The Department of Labor "Interim Presumption" (Pet. App. 37a)

STATEMENT OF THE CASE

A. Introduction

More than 424,000[3] claims filed under the Black Lung Benefits Act,[4] 30 U.S.C. §§ 901-945 (1982) ("the Act"), have been adjudicated by the U.S. Secretary of Labor under a comprehensive benefit eligibility regulation called the "interim presumption," 20 C.F.R. § 727.203 (1987). Approximately 155,000[5] of these claims were denied after adjudication and are now closed, while some 9,600[6] remain pending.

There are two versions of the "interim presumption": one promulgated by the Social Security Administration ("SSA") in 1972 at 20 C.F.R. § 410.490 (1987), and one adopted by the Secretary of Labor in 1978 at 20 C.F.R. § 727.203. The two

3. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office; Sam Church, Jr., President, United Mine Workers of America; Charles Coakley, Counsel, American Insurance Association) *("1981 Oversight Hearings")*.

4. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a),(d), 100 Stat. 312, 313, and Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503.

5. *1981 Oversight Hearings, supra* note 3.

6. Solicitor General's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in No. 87-1095 at 11.

versions are similar, but not identical. Black lung claims within SSA's jurisdiction were considered only under section 410.490, and claims within the Labor Department's jurisdiction were considered only under section 727.203.

The United States Court of Appeals for the Eighth Circuit directed the Secretary of Labor to reopen all previously denied and closed Labor Department claims and readjudicate them under the SSA interim presumption. *Sebben* v. *Brock*, 815 F.2d 475 (8th Cir. 1987). The United States Court of Appeals for the Fourth Circuit held that still pending claims also are to be considered under the SSA interim presumption. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987). This Court has consolidated the two cases. 108 S. Ct. 1288 (1988).

The potential combined impact of these decisions is staggering. The cost of readjudication alone is sure to be hundreds of millions of dollars. The cost to the U.S. coal industry and its insurers in added benefits payable will reach into billions of dollars, virtually all of which liability is unfunded and unanticipated.[7]

The Pittston Coal Group and its co-petitioners seek reversal of the holdings below in both *Sebben* and *Broyles*, and the restoration of order in the federal black lung program.

B. Background of the Black Lung Benefits Program

The Black Lung Benefits Act establishes a federal program to compensate coal miners and their families for total disability or death due to coal workers' pneumoconiosis ("black lung" disease). 30 U.S.C. § 901(a). The program is divided into two segments called "Part B," 30 U.S.C. §§ 921-925, and "Part C," 30 U.S.C. §§ 931-945. The Part B program began on December 30, 1969, and terminated for new claims on June 30, 1973.

7. *See* Brief Amici Curiae of the American Insurance Association and the National Council on Compensation Insurance in Support of the Petition for Writ of Certiorari in *Sebben* at 8-9.

Part B claims were filed with SSA and adjudicated under regulations published by the Secretary of Health, Education and Welfare ("HEW"). Benefits awarded under Part B were and continue to be paid by the U.S. Treasury from general revenues. *See Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 429 (1987). Part B claims are adjudicated in accordance with procedures specified in section 205 of the Social Security Act. 42 U.S.C. § 405, *incorporated into* 30 U.S.C. § 923(b).

Claims filed on or after July 1, 1973, *i.e.*, Part C claims, are filed under the workers' compensation law of the state in which the miner was employed, if that law has been approved by the Secretary of Labor. 30 U.S.C. § 931. In the absence of an approved state law,[8] the claimant may file a claim with the U.S. Department of Labor under regulations published by the Secretary of Labor. *Id.* §§ 902(f), 932, 936. Part C claims, if allowed, are paid by the mine operator that last employed the miner or by its insurance carrier, 20 C.F.R. Part 725, subpart F (1987), or by an accounting entity called the Black Lung Disability Trust Fund, 30 U.S.C. §§ 933, 934, 934a.[9] The Trust Fund is financed by a manufacturers excise tax on coal. 26 U.S.C. § 4121. If unable to meet current obligations from coal tax revenues, the Trust Fund borrows from the Treasury and is obligated to repay these amounts with interest.[10] 30 U.S.C. § 934(a)(4), (5).

8. No state's law has ever been approved under 30 U.S.C. § 931.

9. The Trust Fund is responsible for the payment of claims predicated upon coal mine employment terminated prior to January 1, 1970, 30 U.S.C. § 932(c), or where no responsible mine owner can be identified, or if the identified mine owner refuses to pay the claim, 30 U.S.C. § 934(a). The Trust Fund also pays all administrative expenses of the black lung program, 30 U.S.C. § 934(a)(5), and the attorney fees of counsel representing claimants paid by the Trust Fund. *See, e.g., Republic Steel Corp.* v. *United States Dep't of Labor*, 590 F.2d 77 (3d Cir. 1978).

10. As of September 1987, the Trust Fund owed almost $3 billion to the Treasury. U.S. Dep't of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1987). Four additional supplemental requests for borrowing authority have been made thus far in fiscal year 1988.

Part C also incorporates by reference the claims procedures and several other provisions affecting the rights and duties of employers contained in the Longshore Act. 33 U.S.C. §§ 901-952 (Supp. IV 1987), *incorporated in parts into* 30 U.S.C. § 932(a). The Longshore Act is a federal workers' compensation law for persons engaged in maritime employment. Longshore Act procedures contemplate an Administrative Procedure Act ("APA") trial, 5 U.S.C. § 554, *incorporated into* 33 U.S.C. § 919(d), an administrative appeal to the Department of Labor's Benefits Review Board and a further appeal as of right to a United States court of appeals, 33 U.S.C. § 921.

Part B and Part C are fundamentally different in both statutory design and intent. Part B was intended to be a unique remedial measure to compensate miners unable to obtain workers' compensation benefits under state laws. It was not intended to be a workers' compensation law. *See* H.R. Rep. No. 460, 92d Cong., 2d Sess., pt. 1, at 5-7 (1971); *Hearing on H.R. 18, H.R. 42, H.R. 43 and H.R. 5702 Before the General Subcomm. on Labor of the House Comm. on Education and Labor* 56-58 (1971). Part C was intended to either facilitate the integration of the federal program into existing state workers' compensation laws or to function like, and in lieu of, a state workers' compensation program.[11] *See* H.R. Rep. No. 460, *supra*, at 26-28; S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (stating it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations"); *see also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 397 (7th Cir. 1987).

C. Background of the Interim Presumptions

The original Act delegated exclusive authority to write medical eligibility rules for both Part B and Part C claims to the Secretary

11. Section 224 of the Social Security Act, 42 U.S.C. § 424a(2)(A), requires the reduction of social security disability insurance benefits by workers' compensation benefits paid to the SSDI beneficiary. For purposes of section 224, Part C benefits are deemed workers' compensation benefits but Part B benefits are not. 30 U.S.C. § 922(b).

of HEW.[12] During the second year of the Part B program Congress became dissatisfied with SSA's claims approval rate, and for that and other reasons amended the Act in several significant respects[13] in the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.).

The Senate Committee on Labor and Public Welfare, responding to SSA testimony concerning the unexpectedly large volume of claims filed and the paucity of certain medical testing facilities in coal mining areas, included in its Report special instructions for SSA.

> The backlog of claims which have been filed under [Part B of the Act] . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these Amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claim [sic] on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [by HEW].

12. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 402(f), 411, 83 Stat. 793 (1969). The Secretary of Labor believed he had no authority to write medical eligibility standards and so informed Congress. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 508, 522-26 (Comm. Print 1979) ("*1977 Legislative History*").

13. Among other things, the 1972 amendments delayed the start of the Part C program for eighteen months, Pub. L. No. 92-303, § 5, 86 Stat. 155, prohibited the denial of a claim solely on the basis of a single negative chest x-ray, added a new eligibility presumption for certain long-term coal miners and liberalized the statutory definition of the term "total disability." *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-36 (1976).

S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23.

After enactment, SSA published a regulation entitled *Interim Adjudicatory Rules for Certain Part B Claims filed by a Miner Before July 1, 1973, or by a Survivor of a Miner Where the Miner Died Before January 1, 1974.* 20 C.F.R. § 410.490. Section 410.490 could not be applied in Part C claims, which were to be considered under an alternative set of SSA regulations, 20 C.F.R. §§ 410.401-.476.[14]

The Labor Department's black lung program began in late 1973, and within a few years it became clear that Labor's approval rate was well below that of SSA. Responding to congressional inquiry, the Labor Department identified the inapplicability of the interim presumption as a significant reason for its lower approval rate and asked SSA to revise its rules to make the presumption applicable in Part C claims. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 49 (1977) *("1977 Senate Hearings"); Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-1974). HEW's general counsel refused this request, suggesting that the presumption was designed to increase the speed and frequency of SSA awards without regard to the validity of the claim and thus could not be constitutionally applied in Part C's adversary setting or to the private liabilities of mine owners.[15]

The debate then moved to Congress. There was essentially no scientific testimony that section 410.490 established a medically valid formula for determining total disability or death due to black lung disease. To the contrary, two SSA staff physicians

14. The Department of Labor adopted the SSA provisions, excluding section 410.490. 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1978) (repealed 1978).

15. *See* H.R. Rep. No. 151, *supra* note 12; P. Barth, *The Tragedy of Black Lung: Federal Compensation for Occupational Disease* 85-91 (1987).

testified that the medical criteria reflected in the rule were scientifically invalid, and that SSA lawyers wrote section 410.490 to eliminate the agency's backlog, erring on the side of an award.[16] Labor Department witnesses echoed SSA's views and sought authority to write scientifically supportable eligibility rules.[17] The Comptroller General of the United States reported that SSA's rule produced large numbers of unsubstantiated awards.[18] This report concluded that any effort to make the SSA interim presumption applicable to Part C claims should also direct the Labor Department to substantiate entitlement by medical evidence.

The House passed a bill requiring application of criteria "not more restrictive than" SSA criteria in Part C claims. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977). The Senate bill authorized the Secretary of Labor to write new Part C eligibility criteria. S. 1538, 95th Cong., 1st Sess. § 2 (1977). The compromise bill conformed to the Senate version, but also provided:

> Criteria applied by the Secretary of Labor in the case of . . .[certain categories of claims filed prior to publication of Labor's new regulations] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

16. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) *("1977 House Hearings"); 1977 Senate Hearings, supra* p. 8, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA).

17. *1977 Senate Hearings, supra* p. 8, at 154; *1977 House Hearings, supra* note 16, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

18. Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47, 52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 8, at 316-20, 325.

30 U.S.C. § 902(f)(2).[19] The conferees cautioned the Labor Secretary that SSA's history of making unsubstantiated awards was not to be repeated and instructed the Secretary to write a regulation no more restrictive than those applicable to a claim filed on June 30, 1973, "*except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.*" H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309 (emphasis added).

D. The Two Presumptions Contrasted

The Secretary of Labor published an interim presumption for Part C claims on August 18, 1978. 43 Fed. Reg. 36,825 (1978). Labor's rule is unavailable unless the miner worked "at least 10 years" in coal mine employment. 20 C.F.R. § 727.203(a).[20] After proving that fact, the presumption is invoked if chest x-ray, autopsy or biopsy evidence establishes the existence of pneumoconiosis, or pulmonary function (ventilatory) tests show values meeting published standards, or arterial blood gas study results meet published standards, or medical opinion evidence establishes a totally disabling lung disease, or in the absence of medical evidence, lay testimony demonstrates a totally disabling lung disease. *Id.* § 727.203(a)(1)-(5).

Section 410.490 can be invoked only if chest x-ray, autopsy or biopsy evidence establishes pneumoconiosis, or if pulmonary function tests meet published values identical to those in section

19. In the 1977 amendments, Congress directed the Secretary of Labor to automatically reopen and reconsider all previously denied Part C claims under the more favorable eligibility rules adopted in 1978. Congress also afforded previously denied Part B claimants the opportunity to seek further review, on their own election, by either SSA or the Department of Labor, or by both agencies. 30 U.S.C. § 945(a), (b)

20. In neither Part B nor Part C does the unavailability of an interim presumption end the consideration of a claim. A claimant who cannot use the interim rule may still establish eligibility either under the statutory presumptions, 30 U.S.C. § 921(c)(1)-(5), or by direct proof of disability or death due to black lung disease, 20 C.F.R. §§ 410.490(e), 727.203(d).

727.203(a)(2). 20 C.F.R. § 410.490(b)(1)(i), (ii).[21] SSA invocation on pulmonary function scores requires either ten or fifteen years of coal mine employment.[22] *Id.* § 410.490(b)(1)(ii), (b)(3). Under section 410.490(b)(2), a miner with positive x-ray evidence may not invoke the SSA presumption unless "the impairment established in accordance with subparagraph (1) of this paragraph arose out of coal mine employment." The provision then ends with the parenthetical "(see §§ 410.416 and 410.456)." The parenthetical cross references two alternative means of establishing occupational causation of the disease—either by proof of ten years of mine employment, or by proof "necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines (see §§ 410.110(h), (i), (j), (k), (l), and (m))." *Id.* §§ 410.416, 410.456. Although the route is circuitous, one may conclude from the language[23] that a claimant who had not worked in mining for ten years could invoke the SSA presumption on positive x-ray proof combined with proof of occupational causation.[24]

21. SSA paid benefits on the basis of arterial blood gas studies meeting published values and proof of pneumoconiosis. 20 C.F.R. Part 410 subpart D Appendix. Labor's blood gas tables are less restrictive than those used by SSA.

22. The provisions are internally inconsistent.

23. Petitioners believe, but cannot clearly demonstrate in published case law, that SSA did not permit use of section 410.490 absent ten years of coal mine employment. Sources imply that this was the case but are inconclusive. *See Maxey* v. *Califano*, 598 F.2d 874, 876 & n.3 (4th Cir. 1979); *see also* Comptroller General of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 4, 12 (1980). It is clear that persons involved with the program believed that ten or more years were required. *Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 353, 367, 395, 398 (prepared statement of Bedford W. Bird, Deputy Director, Department of Occupational Health, United Mine Workers' of America; testimony of John Rosenberg, Director, Appalachian Research and Defense Fund).

24. A positive chest x-ray alone is not diagnostic of black lung disease and may exhibit a lung tissue reaction due to coal dust, other dusts, smoking or other causes. Pendergrass, et al., *Roentgenological Patterns in Lung Changes that Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

Thus, the medical bases for invocation in section 727.203 are as favorable or more favorable to claimants than are the SSA provisions. But, at least theoretically, SSA's rules permit some short-term coal miners to use the presumption while Labor imposes a ten-year threshold in all cases.

Rebuttal differences between the two presumptions are dramatic. The SSA rule may be rebutted if the miner is still working, or if "other evidence" shows that the miner is able to work. 20 C.F.R. § 410.490(c)(1), (2). The SSA rebuttal inquiry has nothing to do with whether black lung disease is present, or if present, whether it has any role in the miner's inability to work. Although the intricate cross references employed in the SSA rules could be construed otherwise, the circuit courts have noted "the HHS presumption cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). The Fourth Circuit holds, "the only way to rebut this [SSA] presumption is to show that the claimant is doing or capable of doing his coal mine work." *Broyles*, 824 F.2d at 329.

Of the one and one quarter million black lung claims filed, approximately 600,000 were processed by SSA under section 410.490. Yet, we are unable to find a single reported case in which section 410.490 was rebutted by medical proof that the miner did not have black lung disease or was not medically disabled by the disease.[25] This is astounding, but not inconsistent with Congress's perception and the Comptroller General's findings that rebuttal by SSA was not generally contemplated, and rebuttal evidence was not considered. *See supra* pp. 8-9 and note 18.

By contrast, the rebuttal language of Labor's rule requires the consideration of all relevant evidence, and provides for rebuttal if proof establishes that the miner is not totally disabled by, did not

25. The few instances in which rebuttal of the SSA rule was permitted are cases involving a miner still employed in his regular coal mine job. *See Farmer* v. *Weinberger*, 519 F.2d 627 (6th Cir. 1975). It appears that SSA attempted, on occasion, to rebut section 410.490 solely on the basis of blood gas test results but the courts rejected these attempts. *See Oliver* v. *Califano*, 476 F. Supp. 12 (D. Utah 1979); *Mutter* v. *Weinberger*, 391 F. Supp. 951 (W.D. Va. 1975).

die due to, or did not have pneumoconiosis. 20 C.F.R. § 727.203(b)(1)-(4). Although there is little uniformity among the circuits (and even within each circuit) on rebuttal rules, rebuttal of Labor's rule by disproving a presumed fact is difficult but possible.[26] Rebuttal of SSA's rule by disproving presumed medical facts is not possible.

E. Background of the Litigation

In 1982, a Third Circuit panel held that section 727.203 was more restrictive than section 410.490, and thus violated 30 U.S.C. § 902(f)(2), because the Labor rule does not afford a short-term miner the opportunity to benefit from the interim presumption. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 30, 31 (3d Cir. 1982). On rehearing, the Government argued that its rule does not violate 30 U.S.C. § 902(f)(2) because Congress did not direct Labor to adopt all of SSA's rule. Rather, the statute and, more importantly, its history focus only on the "medical criteria" of SSA's rule.

It is the Secretary of Labor's position that the agency was required to make the basic interim presumption available by x-ray, autopsy, or biopsy proof of pneumoconiosis, or ventilatory test values matching those used in section 410.490(b). The agency was not also required to adopt the additional evidentiary devices of section 410.490. In support of this argument, the Government points to substantial proof that Congress intended a

26. *See Wright* v. *Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987) (disability due to heart disease not compensable); *Kolesar* v. *Y & O Coal Co.*, 760 F.2d 728 (6th Cir. 1985) (miner too old to work, but not disabled); *Knudtson* v. *Benefits Review Board*, 782 F.2d 97, 100 (7th Cir. 1986) (presumption of pneumoconiosis rebutted by proof of no occupational disease); *Peabody Coal Co.* v. *Lowis*, 708 F.2d 266 (7th Cir. 1983) (disability due entirely to cigarette use not compensable). *But see Roberts* v. *Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987) (benefits awarded for disability due to stroke). The *published* decisions of the Fourth Circuit make rebuttal all but impossible. *See Adkins* v. *United States Department of Labor*, 824 F.2d 287 (4th Cir. 1987); *Sykes* v. *Director, Office of Workers' Compensation Programs*, 812 F.2d 890 (4th Cir. 1987). Labor's rebuttal provisions are still frequently litigated in the circuit courts.

distinction between "medical criteria" and "evidentiary standards." A majority of the Third Circuit panel, over a strong dissent, was unconvinced and ordered the Secretary to readjudicate Halon's claim under section 410.490. *Halon*, 713 F.2d at 21, 25.

The Eighth Circuit followed suit and directed the Secretary to apply section 410.490 in two cases arising within that court's jurisdiction. *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985). The Eighth Circuit added little to the discussion, noting only that it would not defer to the Secretary's regulation. *Id.* at 968.

The issue was addressed by the Seventh Circuit in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987). This panel disagreed with the Third and Eighth Circuits.

> From their inception in 1969, however, the Part B and Part C programs were intended to be separate and distinct. This difference was only accentuated in 1977 when Congress delegated the regulatory authority with respect to Part C claims to the Secretary of Labor while leaving the regulatory authority with respect to Part B claims with the Secretary of HEW. Until permanent Part C regulations could be promulgated, Congress mandated in § 902(f)(2) that the Part B interim medical standards be applied by the Secretary of Labor. . . . But the Secretary was not otherwise bound by the Part B rules and was free to adopt his own adjudicative criteria for processing such claims.

817 F.2d at 405-406. In reaching this conclusion, the Seventh Circuit defers to the Secretary's rule, finding no clear indication that the Secretary's interpretation of section 902(f)(2) departs from Congress's intent.[27]

27. The Seventh Circuit reiterated its holding in *Taylor* v. *Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1720). *Taylor* involves a miner with *more than* ten years of employment seeking the more favorable rebuttal format of section 410.490.

The Sixth Circuit then adopted the reasoning of the Third, noting that the term "criteria" in 30 U.S.C. § 902(f)(2) was generic and justified no distinction between "medical" and "nonmedical" provisions, as urged by the Labor Secretary. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 143 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3643, 3484 (U.S. Dec. 21, 1987) (Nos. 87-1045, 87-1065). Judge Guy dissented, having been persuaded by Judge Weis' dissent in *Halon*. 819 F.2d at 144.[28]

The Fourth Circuit's turn came in *Broyles*. Finding the reasoning of *Halon* more persuasive than that of the Secretary, the *Broyles* panel holds that section 410.490 applies to all Labor Department claims. This panel also holds that "the only way to rebut this presumption is to show that the miner is either doing or capable of doing his usual coal mine work." *Broyles*, 824 F.2d at 329. The Third Circuit joined the Fourth in holding that the section 410.490 rebuttal provisions apply in Labor Department claims. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987).

These decisions have enormously disrupted the ongoing litigation of almost ten thousand pending claims. While several hundred of these are in the circuit courts, the remainder are before the Benefits Review Board or administrative law judges

28. The Sixth Circuit's view differs from *Halon* and *Coughlan* in one important respect. The Sixth Circuit refuses to apply the rebuttal provisions of section 410.490 in claims adjudicated under section 727.203. *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987). Before *Kyle*, the Sixth Circuit addressed the application of section 410.490 *rebuttal* rules to section 727.203 claims, holding that 30 U.S.C. § 902(f)(2) did not "require continuation of the evidentiary rules applicable to Part B cases." *Ramey* v. *Kentland Elkhorn Coal Co.*, 755 F.2d 485, 490 (6th Cir. 1985). To distinguish *Ramey*, the *Kyle* panel held, "*Ramey* should not be read to suggest that the Part B presumptions no longer apply. On the contrary, *Ramey* should be interpreted to hold that although the Part B presumptions are preserved, under certain limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time." 819 F.2d at 144.

("ALJs").[29] *Halon* and its progeny, if upheld, will require retrial of thousands of claims.

F. Background of These Cases and Opinions Below

Sebben began in the U.S. District Court for the Southern District of Iowa as a suit for nationwide class certification and a writ of mandamus to compel the Secretary of Labor to reopen and readjudicate, under section 410.490, all previously denied and closed Part C cases. The district court granted the Secretary's motion to dismiss, holding that plaintiffs failed to exhaust administrative remedies and that the procedures specified for the adjudication of Part C black lung claims did not contemplate review in the U.S. district courts (Pet. App. 22a-23a). Further, the court found no basis on which to exercise jurisdiction under 28 U.S.C. § 1361 as the Eighth Circuit in *Coughlan* imposed no duty on the Secretary of Labor to apply section 410.490 retroactively.

On March 25, 1987, the *Sebben* court, relying on *Coughlan,* reversed the district court. Observing that the persons in the class "deserve to have their claims heard," the Eighth Circuit held that the statutory time limits prescribed for the exhaustion of administrative remedies specified in the Longshore Act are not jurisdictional and erect no barrier to the exercise of mandamus

29. The Benefits Review Board held that in all cases arising in the Third, Fourth, and Sixth Circuits (by far the majority of cases), section 410.490 must be applied in its entirety for purposes of both invocation and rebuttal. *Peyton* v. *Brown Badgett, Inc. Coal Co.*, 10 Black Lung Reporter (MB) 1-122 (Benefits Review Board 1987) (Sixth Circuit); *Shortt* v. *Westmoreland Coal Co.*, 10 Black Lung Reporter (MB) 1-127 (Benefits Review Board 1987) (Fourth Circuit); *Grieco* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Reporter (MB) 1-139 (Benefits Review Board 1987) (Third Circuit). The Board applies SSA's rule whether or not the claim involves fewer than ten years of mine employment. *Cornelius* v. *D. W. Miller, Inc.*, 11 Black Lung Reporter (MB) 1-29 (Benefits Review Board 1988). There is, in fact, no logic to restrict section 410.490 to the claims of short-term miners. On May 2, 1988, however, the Benefits Review Board issued a decision holding section 410.490 invalid as applied in Part C claims on the ground that the rule had never been published for notice and comment as required by 5 U.S.C. § 553. *Whiteman* v. *Boyle Land and Fuel Coal Co.*, 11 Black Lung Reporter (MB)___, BRB No. 87-348 BLA (Benefits Review Board 1988). How ALJs will resolve the apparent conflict between the Board and the circuits is not yet known.

jurisdiction by the district court (Pet. App. 15a). The Eighth Circuit directed the district court to certify the class and grant a writ ordering the Secretary to readjudicate each claim within it, citing *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986). The class was to comprise all previously denied and closed claims filed between December 30, 1969 and April 1, 1980, involving a claimant who had submitted at least one positive chest x-ray, but did not work in coal mining for at least ten years (Pet. App. 16a). The Solicitor General and intervenors then filed petitions for a writ of certiorari.

Broyles involves the claims of two former coal miners, Charlie Broyles and Bill Colley. Broyles worked as a coal miner for about five years from 1946-1952 (Broyles App. 11a). Colley worked in mining for approximately nine and one-half years from 1945-1959 (Broyles App. 24a). Broyles' x-ray evidence was deemed positive by the ALJ (Broyles App. 13a). Proof of pneumoconiosis was deemed "questionable" by the ALJ in Colley's case (Broyles App. 27a).

In *Broyles,* the ALJ reviewed all of the medical evidence and, after resolving all doubt in favor of the claimant, concluded that the record was devoid of substantial proof that Broyles is totally disabled due to pneumoconiosis. No presumptions were applied in this analysis and the claim was denied (Broyles App. 16a-17a). The Benefits Review Board affirmed per curiam (Broyles App. 8a), and Broyles appealed to the Fourth Circuit.

In *Colley,* the ALJ reviewed the medical record and found most persuasive the opinions of two physicians that Colley's health problems were not due to coal mine employment. No presumptions were applied, and the claim was denied (Broyles App. 28a). The Benefits Review Board affirmed, finding the ALJ's decision supported by substantial evidence. The Board also rejected Colley's section 410.490 argument (Broyles App. 20a-21a). Colley then appealed to the Fourth Circuit, which consolidated the two cases. The Fourth Circuit followed *Halon* and reversed the Benefits Review Board in both cases. The Solicitor General filed a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

These cases present several questions of significance. Primary among them is whether the Black Lung Benefits Act precludes the Secretary of Labor's discretion to design an interim presumption that requires ten years of coal mine employment for its invocation and affords employers a fair opportunity for rebuttal. The language of the Act and its history reasonably support the premise that the Labor Secretary was not compelled to merely republish the SSA rule. Indeed, Labor was directed not to do so, and could not do so in keeping with the agency's duty to preserve the rights of claim defendants to a fair hearing.

In designing its rule, Labor undertook to accommodate all competing interests and through this effort produced an entitlement standard of unprecedented liberality in civil litigation. As the rule evolved, Labor took all reasonable steps to ensure its compliance with congressional purposes, going so far as to ask the most outspoken members of Congress for written approval. Having obtained that approval, Labor published its rule, and the rule passed muster in the regulatory process. It has been applied in hundreds of thousands of claims and has delivered billions of dollars in benefits to miners and their families. The Secretary of Labor's actions accord with Congress's intent and purposes and are well within the limits of discretion. They are entitled to judicial deference. Section 727.203 is valid for these reasons.

The preference of the courts below for the SSA rule narrowly focuses on the single word—"criteria"—in the midst of thousands and fails to acknowledge the many factors that must be accorded weight in the validity equation. Moreover, were the courts below correct in deciphering Congress's purposes, the result that follows denies due process of law to mine owners. The Due Process Clause of the Fifth Amendment does not allow the imposition of private liabilities on the strength of a rule of evidence that defies reason.

The Eighth Circuit has compounded the error by mandating the retrial of tens of thousands of closed claims under the SSA rule. The Eighth Circuit has no jurisdiction to accomplish this

result. Black lung claims are litigated under incorporated provisions of the Longshore Act. The Longshore Act expressly precludes access to the district courts and it embodies the premise that final decisions in claims are in fact final. Its time limitations for pursuit of the remedies provided are mandatory and jurisdictional. They may not be waived. The *Sebben* plaintiffs have sought to bypass the Longshore Act but the Act expressly prohibits them from doing so.

Apart from the Longshore Act, res judicata is properly applied in this setting. The claimants had their day in court, and there is no valid reason to permit them to start over.

The Eighth Circuit's reliance on the mandamus statute is similarly misguided. Mandamus jurisdiction is ousted by the Longshore Act. Were that not the case, mandamus remains an improper judicial response to the issues presented. The Labor rule evolved in a complex accommodation of competing considerations. It is a complex rule and has been beset by controversy. Its promulgation was by no theory a ministerial act. This is not a case where mandamus authority, or any other theory of law, authorizes a court to dictate the result.

The decisions of both the Fourth Circuit and the Eighth Circuit are manifestly in error in all respects and should be reversed.

ARGUMENT

I.

THE SECRETARY OF LABOR'S REGULATION IS VALID AND IS THE ONLY INTERIM PRESUMPTION THAT MAY BE APPLIED IN PART C CLAIMS

A. The Act Does Not Compel the Labor Department to Use All of the SSA Rule

The fundamental question presented in *Sebben* and *Broyles* is whether section 727.203 is a valid regulation. Labor's rule is not ambiguous. It requires ten years of coal mine employment for its invocation, and it provides for the rebuttal of presumed facts. The SSA rule is, at least theoretically, available to miners with

positive chest x-rays who did not work in mining for at least ten years. Certain facts presumed by the SSA rule (*i.e.*, the presence of pneumoconiosis or a totally disabling condition connected at least in part to this occupational disease) are irrebuttable. The validity of section 727.203 turns on whether the Act authorizes these differences.[30] The starting point in the inquiry is the language of the Act. *CBS* v. *FCC*, 453 U.S. 367, 377 (1981).

Benefits are payable under the Act only if (1) the miner has pneumoconiosis, (2) the disease arose out of coal mine dust exposure (disease causation), (3) the miner has a totally disabling condition or is deceased, and (4) the totally disabling condition or death is attributable at least in part to pneumoconiosis (disability causation). 30 U.S.C. § 901(a); *see also Mullins Coal Co.*, 108 S. Ct. at 431.

Part A of the Act, 30 U.S.C. § 901-902, contains general provisions defining the Act's terms and allocating authority to the administering agencies to write benefit eligibility rules. Section 402(b) defines the term "pneumoconiosis" to mean "a chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). No special regulatory authority is allocated to Labor or SSA to define disease causation. The Act, however,

30. The Labor rule exhibits no technical defects. Section 426(a) of the Act, 30 U.S.C. § 936(a), requires the Secretary of Labor to issue regulations in conformity with 5 U.S.C. § 553. That was done here. 43 Fed. Reg. 17,770-71 (1978). More importantly, 30 U.S.C. § 936(a) and 30 U.S.C. § 902(f)(1) clearly provide that *only* the Secretary of Labor may issue regulations governing Part C claims. To simply apply SSA's rule to Department of Labor claims violates the Act. Question 3 in the Petition for a Writ of Certiorari filed by the Pittston Coal Group and its co-petitioners inquires whether the court below may simply promulgate a rule for the Department. It is axiomatic that the court has no authority to write an agency rule. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 545 (1978). Thus, were this Court to agree with the Fourth and Eighth Circuits that section 727.203 is impermissibly restrictive, the matter must be remanded to the Secretary of Labor for rulemaking under 5 U.S.C. § 553. Because the answer to Question 3 is not dispositive, and because it goes to the remedy and not the merits, the question is not further discussed in this Brief.

permits a presumption of occupational cause if a miner has ten or more years of employment. 30 U.S.C. § 921(c)(1), (2).

The term "total disability" is defined in 30 U.S.C. § 902(f). This provision allocates regulatory authority to the Secretary of Labor to define "total disability" for Part C claims and to the Secretary of HEW to define "total disability" for Part B claims "subject to the relevant provisions of subsections (b) and (d) of section 413 [30 U.S.C. § 923(b), (d)]," 30 U.S.C. § 902(f)(1), and several other limitations listed in 30 U.S.C. § 902(f)(1)(A)-(D), (f)(2). Section 902(f)(1)(D) directs the Secretary of Labor, in collaboration with the National Institute for Occupational Safety and Health, to "establish criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners. . . ." Section 902(f)(2) directs that in all claims reopened by Congress in 30 U.S.C. § 945, and in all new claims filed before the Secretary of Labor developed new rules, "criteria applied by the Secretary of Labor shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973. . . ."

The language in section 902(f)(2), in context, submits to no easily settled meaning. Had Congress wanted Labor to apply the SSA rule without modification or elaboration, or had Congress intended to revoke the Secretary of Labor's regulatory authority to write a rule of his own design, it would have been a very simple matter to have said so. Instead, Congress enacted a fairly complex structure, leaving it to the agencies to effectuate congressional purposes in published rules.

While implications may arise from the statutory context and choice of words,[31] this is surely not a case where the words themselves speak so clearly that there is no room for agency interpretation. It is a case where resort to the legislative history is required.

31. The word "criteria" is used three times in 30 U.S.C. § 902(f). If the usages are read *in pari materia* they imply a reference to medical data or medical standards only. The reference to criteria "applicable under section 223(d) of the Social Security Act" in 30 U.S.C. § 902(f)(1)(C) is instructive. For purposes of determining an applicant's entitlement to Social Security disability insurance benefits, SSA rules employ the term "criteria" to mean medical guides for total disability. 20 C.F.R. §§ 404.1511(a), 404.1525 and Appendix 1 to Subpart P (1987). In 30 U.S.C. § 902(f)(1)(D), the term

See Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

B. The Legislative History Demonstrates that Congress Contemplated the Use of a Different Interim Presumption in Part C Claims

Fairly read, the vast legislative history of the Black Lung Benefits Reform Act of 1977 supports two conclusions: (1) that the Secretary of Labor was not required to include every provision of section 410.490 in the Labor rule, and (2) that the Secretary complies with 30 U.S.C. § 902(f)(2)—so long as the Labor rule encompasses the medical bases for invocation employed by SSA.

The original authorizing language directing SSA to adopt an interim presumption describes a two-part standard comprised of "interim evidentiary rules and disability evaluation criteria" or "interim rules and criteria." S. Rep. No. 743, *supra* p. 8 , at 2322-23. Following this format, section 410.490 contains specific disability evaluation criteria (*i.e.*, x-ray, autopsy and biopsy findings or ventilatory test scores), 20 C.F.R. § 410.490 (b)(1), and collateral evidentiary rules, *id.* § 410.490(b)(2), (b)(3), (c). The medical disability criteria give rise to the basic interim presumption of entitlement. The collateral evidentiary rules allocate and shift burdens of proof regarding disease causation and rebuttal, but contain no medical criteria.

The earliest proposals to enlarge the population of claimants who could benefit from an interim presumption extended all parts of the SSA rule to additional claims. A 1974 House proposal would have reopened Part B for six months, and would have required the adjudication of claims filed during this period "on the same basis as if filed on June 30, 1973" (the expiration date of section 410.490).[32] H.R. 17178, 93d Cong., 2d Sess. § 11 (1973). The proposal to adopt this approach generated heated controversy.

"criteria" also directly relates to "criteria for . . . medical tests." *See also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d at 401.

32. Later proposals employed the same reopening formula. H.R. 7, 94th Cong., 1st Sess. §§ 8,11 (1975); H.R. 8, 94th Cong., 1st Sess. §§ 8, 11 (1975).

Both administering agencies and agency scientists opposed the extension of SSA's rule. *See supra* at pp. 8 - 9. Scientific witnesses representing the American Lung Association and the American Thoracic Society testified that House proposals, including extension of SSA's rules, would require awards of benefits "without regard to sound medical criteria for the determination of such disability. . . . [T]he adoption of these interim criteria would result in the determination of disability in individuals fully capable of . . . active employment." ***Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor,*** 95th Cong., 1st Sess. 259-60 (1977) (statement of Dr. Hans Weill). Although we do not know to what degree, if any, House proponents were influenced by this testimony, the final House bill settled upon application of the "criteria" of section 410.490 after June 30, 1973. H.R. 4544, 95th Cong., 1st Sess. § 7 (1977).[33]

The Senate did not extend any part of section 410.490 to claims filed after June 30, 1973. S. Rep. No. 209, 95th Cong., 1st Sess. 12-14 (1977), ***reprinted in 1977 Legislative History, supra*** note 12, at 615-17. Instead, the Senate version directed the Department of Labor to write its own eligibility rules, noting "this section does not require nor preclude the blanket incorporation of any provision now a part of existing HEW medical eligibility regulations . . . ." *Id.*

The Conference Committee accepted the Senate approach with the proviso that the Part B "medical standards" were to apply in pending and reopened claims according to regulations designed by the Secretary of Labor and published in the Federal Register. H.R. Rep. No. 864, *supra* p. 10. The Conference Report further emphasized that "all standards are to incorporate the presumptions contained in Section 411(c) of the Act [30 U.S.C. § 921(c)]." *Id.* The statutory presumptions require at least ten years of coal mine employment for their invocation.

33. The House bill proposed dramatic changes in the structure of the program. Among other things, it eliminated a mine owner's right to contest claims, yet retained the mine owner's obligation to pay approved claims. It is apparent that the House bill presented significant questions of constitutional dimension.

When the conference bill was reported back to the House and the Senate, its supporters in each chamber made two points: (1) Labor was expected to use the presumption differently than had SSA; and (2) the identity between the SSA rule and the new Labor Department rule was firm only with respect to "medical" criteria.

Senator Randolph, a conferee, emphasized that Labor was to apply the "interim medical standards" until new regulations were drafted by the Secretary of Labor. 124 Cong. Rec. 2330-31 (1978). Senator Javits, another conferee, reiterated his colleague's emphasis on Labor's obligation to use SSA's "medical criteria." *Id.* at 2333. Senator Javits added:

> The "interim" standards as they were applied to determine benefit claims under Part B, have been highly controversial and widely criticized. For example, the Secretary of Labor on September 30, 1977, stated:
>
> The Part B standards are not medically sound for providing benefits to all deserving individuals.

Id.[34]

In the House, conferees Simon and Perkins engaged in the following colloquy:

> *Mr. Simon*: Mr. Speaker, I would like to ask Chairman Perkins, who also served as chairman of the Conference Committee, if in his opinion this legislation clearly requires that all denied or pending claims subject to the review provisions of the new section 435 [30 U.S.C. § 945] will be subject to reconsideration under the so-called interim medical criteria applicable under Part B of the black lung program?
>
> *Mr. Perkins*: That is the intent of the legislation .... All claims filed before the date that the Secretary of Labor promulgates new medical standards under Part C are subject to evaluation under standards that are no more restrictive than those in effect as of June 30, 1973 .... These are the standards HEW has applied under Part B and they are the precise and only standards HEW will apply to these old claims it must review according to this legislation. As for the Labor Department, it too must apply the interim standards to all of the claims filed under Part C .... We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim standards to its Part C claims within the context of all relevant medical evidence. But there is no such direction or requirement imposed on HEW .... We expect that HEW will review these old claims according to the same interim criteria it has applied in the past.
>
> I would also add that this legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the interim standards .... Insofar as the interim standards address medical criteria, they cannot be made more restrictive.
>
> *Mr. Simon*: ... Mr. Speaker, I am pleased that the language in this bill is crystal clear on the subject of the medical standards ....
>
> * * *
>
> It should not be possible to misconstrue the meaning of this language. The Department of Labor is required to apply medical criteria no more restrictive than criteria being used by [SSA] ....
>
> * * *
>
> So the Secretary [of Labor] is not confined to the medical evidence of the interim criteria and yet may not prescribe criteria more restrictive than the Social Security interim adjudication standards.

Id. at 3431.

Before publication of a proposed Labor Department version of the interim presumption, the draft rule was submitted by the Secretary of Labor to Representatives Perkins, Simon and Dent, the most active and vocal advocates of liberalization. A responding letter signed by the three congressmen stated:

34. Expressing concern for the solvency of the Black Lung Disability Trust Fund, Senator Javits also wanted HEW to change its practices under its interim presumption so that all Part B and Part C claims subject to review under the 1977 amendments would be treated equally. 124 Cong. Rec. 2333. Congressman Perkins wanted HEW to decide cases as it had before, recognizing that the Labor Department would do things differently. 124 Cong. Rec. 3426, 3431 (1978).

> [T]he Committee strongly supports the repromulgation of the interim standards, as found in Section 727.203(a) . . . .
>
> * * *
>
> In Section 727.203(a)(1), DOL follows the exact wording of the interim standards covering x-ray evidence . . . . If a miner-claimant has been engaged in coal mine employment for 10 years and presents an x-ray establishing the presence of pneumoconiosis . . . he may invoke the interim presumption found in Section 727.203(a)(1).

(Pet. App. 44a, 46a.) After the public notice-and-comment period expired, the Secretary of Labor in the Federal Register surveyed the comments on section 727.203 and stated, "the greatest amount of controversy in the comments received has been generated in connection with this section." 43 Fed. Reg. 36,826 (1978). Not a single comment criticized either the Secretary's ten-year requirement or the full rebuttal format provided.

Other factors also played a role in the evolution of section 727.203. Most importantly, it was accepted that disabling black lung disease is virtually unknown in miners with fewer than ten years of coal mine exposure.[35] Second, because the Part C program involves adversarial proceedings under the APA in which private liabilities are adjudicated, the Secretary of Labor had a duty to ensure an acceptable level of fairness in eligibility criteria and rules of evidence. The Secretary of Labor also had a duty to preserve some reasonable level of affordability and predictability, as the Trust Fund was clearly doomed to deficit funding. *See* S. Rep. No. 336, 95th Cong., 1st Sess. 23 (1977).

35. Available information in 1978 compiled by the National Institute for Occupational Safety and Health showed that 99.3% of miners with fewer than ten years of exposure showed no evidence of black lung disease and that these short-term miners who had the disease had its earliest stage. There is no evidence at all that short-term miners suffer the disabling stages of the disease. *1981 Oversight Hearings, supra* note 3, at 32 (attachment to statement of Dr. J. Donald Miller, Director, National Institute for Occupational Safety and Health); *see also Usery*, 428 U.S. at 7 (noting "simple pneumoconiosis ordinarily identified by x-ray opacities of a limited extent is generally regarded by physicians as seldom productive of significant respiratory impairment").

It is reasonable to conclude that the Secretary of Labor had some flexibility in designing the Labor Department rule. Repeated references to the "medical criteria" of the SSA rule and repeated acknowledgments that SSA and Labor would apply their rules differently strongly suggest that the Secretary was bound only to apply SSA's medical criteria. Congress's admonitions that the Secretary of Labor could not ignore relevant medical evidence in designing Labor's rule reflects Congress's intent to permit rebuttal of the Labor presumption. Finally, the rulemaking process itself confirms general satisfaction on the part of Congress and the public with the ten-year requirement and rebuttal provisions of section 727.203.

While not free from doubt, there is no clear proof that either Congress, any member of Congress, or anyone else contemporaneously believed that the Secretary of Labor violated the language or intent of the 1977 amendments in the design and implementation of section 727.203. Although the Third, Fourth and Eighth Circuits were unimpressed by these "ambiguous bits of legislative history," *see Coughlan*, 757 F.2d at 968, the references noted obviously conveyed a message to the Secretary that was accepted by the participants in both the legislative and rulemaking processes. The legislative record supports the validity of the Secretary of Labor's rule.[36]

36. This conclusion with reference to the ten-year requirement is predicated on the assumption that questions regarding "disease causation" in the context of the presumption are evidentiary or adjudicatory standards and not medical criteria. The Seventh Circuit is of the opinion that disease causation is not, in this context, a medical criterion. *Strike*, 817 F.2d at 404-05. This observation is supported by the fact that "disease causation" in the statute is treated entirely apart from "disability causation" or total disability. *Compare* 30 U.S.C. §§ 902(b), 921(c), 932(h) *with* 30 U.S.C. § 902(f). The SSA interim presumption also treats proof of disease causation as an evidentiary standard and not as medical criteria. One can argue that "disease causation" is a medical criterion, at least in common parlance. The Secretary of Labor's perception that disease causation was not what Congress had in mind when it directed the Secretary to adopt SSA medical criteria resolves this argument. There is a good deal of proof that the Secretary is right and no definitive evidence that his judgment is wrong.

C. The Secretary of Labor's Rule is Valid and Deserves Judicial Deference

The Act confers on the Secretary of Labor the authority to define the term "total disability" for Part C claims. 30 U.S.C. § 902(f)(1), (2). The Secretary promulgated these eligibility rules. In reviewing similar grants of authority, this Court has held "[w]here ... the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Bowen* v. *Yuckert*, 107 S. Ct. 2287, 2293 (1987) (quoting *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983)). This Court has consistently accorded weight to an agency's construction of its own statute and deferred to the agency's accommodation of conflicting policies "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U.S. 374, 383 (1961); *accord Chevron, U.S.A.*, 467 U.S. at 845. This Court's traditional test validates section 727.203.

The plain language of section 902(f) is less than clear. If, in isolation, the term "criteria" in subsection 902(f)(2) has broad general meaning, the context of the Act and particularly the whole of section 902(f) prompt further inquiry. Section 902(f) addresses criteria for "total disability," while the identity of the compensable disease and disease causation are addressed elsewhere. *See* 30 U.S.C. §§ 902(b), 921(c).[37] The meaning of section 902(f)(2) must be harmonized with all other provisions of the Act. This is enough to justify resort to the legislative history, if the inherently imprecise term "criteria" does not do so on its own accord.[38] *See INS* v. *Cardoza-Fonseca*, 107 S. Ct.

37. Regulatory authority to define "total disability" appears only in section 902(f). Regulatory authority addressing disease causation and diagnosis is conferred in 30 U.S.C. §§ 923(b), 932(h), 936(a).

38. Indeed, the broadest construction of "criteria" in section 902(f)(2) does not limit the term to regulations, but would encompass all sources employed in SSA adjudications, including program bulletins, manuals, SSA rulings, and internal operating procedures. Not only would it be impossible to reconstruct all of these "criteria," but it also would be manifestly unjust to require mine operators to litigate questionable claims in a setting that does not contemplate true adversity. *Cf. Richardson* v. *Perales*, 402 U.S. 389, 403 (1971).

1207, 1221 & n.30 (1987). The lack of clarity in section 410.490 as well as the probability that the rule itself violates the statute, *see* 30 U.S.C. §§901(a), 902(f)(1)(A), 923(b), merit resort to external sources.

The Secretary's interpretation should be upheld so long as it is rational and consistent with the statute. *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987). The Secretary's ten-year rule and full rebuttal format pass muster on both accounts. *Cf. Mullins Coal*, 108 S. Ct. at 440. All relevant considerations support this conclusion. With respect to the rebuttal provisions of section 727.203, the legislative history is quite clear. It directs the Secretary of Labor to terminate SSA's practice of ignoring evidence unfavorable to claimants and write a rule providing for rebuttal of presumed facts. *See supra* pp. 9-10. No less is conscionable in an adversarial proceeding.

The Secretary's uniform ten-year rule for invocation is validated by the evolution of the statutory language and intent from 1973-1978, the course of the debate over these years, specific references to "medical" criteria in the statements of key members of Congress, the scientific proof amassed by Congress demonstrating no evidence of totally disabling pneumoconiosis in short-term miners, and the Labor Department's intimate involvement in the legislative process through the terms of three congresses. If no one indicia is ultimately persuasive, the five in concert are determinative.

In addition, the Secretary's rule was submitted for approval and was approved by the most vigorous congressional advocates of a generous program—the very same members who led the movement to have Labor apply an interim presumption. The rule was contemporary with enactment, and its provisions were consistently and invariably applied by the agency. *See United States* v. *National Association of Securities Dealers*, 422 U.S.

694, 719 (1975). The Department participated in the drafting of the Act. *See Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). And in the course of comprehensive reviews in 1980 and 1981,[39] including a careful reconsideration of benefit eligibility standards, not only did Congress fail to find fault with Labor's usage, but none of the many interested constituencies that testified found cause to criticize it. *See United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

In sum, all traditional canons of interpretation and deference support the Secretary's rule. Conclusions to the contrary reached by the courts below are impressionistic at best and assume, incorrectly, that in the case of a rule like section 727.203, the agency's long-standing and consistent view and contemporaneous understanding of its mission are entitled to little consideration. The rule should be sustained.

D. Section 410.490 Cannot be Applied to Impose Liability on Coal Mine Owners Under the Due Process Clause of the Fifth Amendment

It is one thing for the Government to compensate miners from federal funds as a matter of congressional policy, but it is a far different thing to "take" compensation from a mine owner without a reasonable basis for imposing such liability. Presumptions pass constitutional muster if there is "some rational connection between the fact proved and the ultimate fact presumed." *Mullins Coal*, 108 S. Ct. at 440 n.32 (quoting *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed*, 219 U.S. 35, 43 (1910)). The test is assuredly an easy one to meet, requiring the invalidation of a presumption only if it is found to be "purely arbitrary." *Usery*, 428 U.S. at 30. In *Usery*, the statutory presumptions requiring ten or fifteen years of coal mine employment were easily sustained under this standard. SSA's rule and, if read according

39. *See 1981 Oversight Hearings, supra* note 3; *Report and Recommendation of the Subcomm. on Oversight of the Comm. on Ways and Means, U.S. House of Representatives on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. (1981).

to *Broyles*, its statutory predicate in 30 U.S.C. § 902(f)(2) are not so easily disposed of under this traditional test.

SSA's rule is invoked by chest x-ray, autopsy or biopsy evidence showing any stage, including the most minimal stage of black lung disease, or by ventilatory studies meeting specified values. Once invoked, it presumes that the miner is totally disabled or died due to black lung disease. 20 C.F.R. § 410.490(b). This presumption can only be rebutted by proof that the miner is working or able to work. *Broyles*, 824 F.2d at 329. Rebuttal is precluded if the miner is unable to work because of non-occupational conditions, such as a back injury, cigarette smokers' bronchitis, *York* v. *Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987), a stroke, *Roberts* v. *Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987), or nothing in particular, *see Adkins* v. *Department of Labor*, 824 F.2d 287 (4th Cir. 1987).[40] Under the *Usery* test, the results here are constitutionally permissible only if the facts proven bear some relationship to the ultimate conclusions dictated by the presumption. They clearly do not.

Under the Due Process Clause, section 410.490 may be sustained as applied to mine owners as a rebuttable presumption if the rational connection test is satisfied, or it may be sustained as an irrebuttable presumption so long as it is not "wholly unreasonable" or "irrational." *Usery*, 428 U.S. at 23-26. Section 410.490 fails both tests. Either inquiry turns on the operation and effect of section 410.490. *Id.* at 24.

The SSA rule presumes total disability based on proof of simple pneumoconiosis. A positive chest x-ray is not conclusive proof of pneumoconiosis much less occupationally caused disability. *See supra* note 24. A positive chest x-ray that shows occupationally induced disease at its early stages does not suggest that the miner is disabled or even impaired. *Usery*, 428 U.S. at 7. For

40. These cases were decided under 20 C.F.R. § 727.203(b)(2), which is the equivalent of 20 C.F.R. § 410.490(c)(2). In Labor's rule, the rebuttal inquiry can move on to address whether pneumoconiosis contributed to the miner's disability or death, or whether the miner has pneumoconiosis. 20 C.F.R. § 727.203(b)(3), (4). Under SSA's rule, the road ends after it is established that the miner is not working or able to work.

a miner with fewer than ten years of exposure, uncontradicted proof presented to Congress showed that disabling occupational disease is virtually impossible. *See supra* note 35.

More significantly, with respect to ventilatory test invocation, the uncontradicted testimony received by Congress from government physicians, the American Lung Association, the American Thoracic Society, and the American College of Chest Physicians demonstrates that the ventilatory test criteria are basically normal values for retired coal miners.[41] *See supra* p.23. The science of the matter is not arguable.[42] Moreover, ventilatory test results measure impairment only and are not in any sense diagnostic of occupational disease.[43]

Thus, under SSA's rule, a miner without impairment or disease may be presumed to be totally disabled due to occupational disease, and the presumed facts may be rebutted only if the miner is working or able to work. If the miner is unable to work because of a non-occupational ailment, rebuttal of SSA's rule is precluded. *See Haywood* v. *Secretary of HHS*, 699 F.2d 277, 283, 285 (6th Cir. 1983).[44]

If viewed as a rebuttable presumption, section 410.490 presumes that a person who either has no disease or minimal disease, or who has no true impairment much less a totally disabling impairment, is totally disabled by occupational disease. Were the presumed facts rebuttable, as they are under section

41. During the notice and comment period on Labor's rule, Dr. Ross Kory, the scientist who did the basic research for the U.S. Army from which the ventilatory values were derived, wrote: "It is difficult for me to understand how any honest, knowledgeable, responsible scientific physician could be a party to such unscientific and invalid standards, no matter how compassionate their intent . . . ." Letter from Ross C. Kory, M.D., Professor of Medicine, University of South Florida College of Medicine, to Robert B. Dorsey, U.S. Department of Labor (June 25, 1978).

42. Those who testified in favor of the criteria did so purely from a policy perspective. *See* H.R. Rep. No. 151, *supra* note 12, at 80-84, 94-96 (minority views and separate views of Rep. Erlenborn).

43. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 4-5 (1986).

44. The Sixth Circuit does not apply the *Haywood* Part B standard in cases arising under section 727.203. *Ramey*, 755 F.2d at 490.

727.203, there would be no valid due process objection. *See Lavine* v. *Milne*, 424 U.S. 577, 585 (1976). But the presumed facts are not rebuttable. There is no rational connection between normal ventilatory tests and the fact that a miner is not working or unable to work because of a back injury, for example.[45] There is no rational basis for imposing liability on a mine owner in the case of a short-term miner on account of an x-ray showing trivial disease, likely to have no effect on the miner's life or on the miner's survivors. *See Usery*, 428 U.S. at 26. There is no rational basis for imposing liability on a mine owner for events in the miner's life causing a termination of coal mine employment (including retirement or old age) in which the mine owner played no role. If section 410.490 is viewed as a rebuttable presumption, the connection between the facts proven and those that are actually presumed is invisible. *See Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1643 (1986).

If SSA's rule is tested as a mandatory inference, the question is whether it is minimally rational to require employers to pay benefits to miners with largely normal pulmonary capabilities or minimal evidence of possible occupational disease, because they are not working, or cannot work, for whatever reason. The prior employment relationship coupled with some trivial impairment of health might satisfy the test of reason,[46] but the equivalence breaks down where the truth, if known, would show that the impairment was not in any way caused by the party obligated to

45. It is conceded, of course, that some claimants will invoke the presumption with truly abnormal ventilatory status or significant x-ray evidence, but even in those cases, on an individual level, reason fails to support the presumption if the claim defendant is prohibited from proving that the abnormal test results are totally unrelated to mining exposure, as is often the case.

46. In *Usery*, this Court sustained the irrebuttable rule of entitlement in section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3), on the grounds that impairment of health alone could sustain the provision. 428 U.S. at 23. But that provision compensates only those who have "complicated" pneumoconiosis, a manifestation of the disease that is indisputably severe and sometimes fatal. Section 411(c)(3) is supported by congressional findings of the seriousness of this stage of the disease. There are no findings that reason out the basis for the mandatory compensation of a health abnormality of no particular consequence to the person affected.

pay. That makes the truth irrelevant as a matter of law.[47] Facts proven by the methods prescribed in SSA's rule have little or, most likely, no connection with totally disabling pneumoconiosis.

This Court has observed that the validity of evidentiary devices under the Due Process Clause depends "on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finders' freedom to assess the evidence independently." *County Court* v. *Allen*, 442 U.S. 140, 156 (1979). Under SSA's rule, the basic and elemental facts are largely unrelated and the fact finder has no freedom to assess relevant evidence.[48] If SSA's rule is applied in cases involving an employer's liability, it makes the mine owner the primary insurer of a miner's unemployment, general disability, or death, without the necessary connection between the employment relationship and the obligation imposed. For mine owners, SSA's rule compels liability without due process of law.

47. In 1980, the Comptroller General informed Congress that "in 88.5% of the cases [awarded under the SSA rule], medical evidence was not adequate to establish disability or death from black lung." Comptroller General of the U.S., *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 8 (1980).

48. *Broyles* is exemplary. Broyles has heart disease. The ALJ also found that Broyles has the earliest possible stage of pneumoconiosis, which one physician attributed to his five years of coal mine work. Under section 410.490, the presumption was invoked. The ventilatory and blood gas testing is largely normal. The below normal results on certain aspects of the tests were attributed by the physicians to either invalid testing or poor cooperation. Another physician commented on the relative severity of Broyles' lung disease and heart disease, concluding that his heart disease alone is disabling and his black lung disease is not (Broyles App. 12a-14a). Both physicians agreed that Broyles is disabled by significant arteriosclerotic heart disease. Under SSA's rule, as the Fourth Circuit correctly notes, the ALJ simply may not consider the uncontradicted evidence that Broyles is not within the eligibility parameters of the statute. Under section 410.490, Broyles must be awarded benefits for his nonoccupational heart disease.

II.

THE EIGHTH CIRCUIT HAS NO AUTHORITY TO MANDATE THE RELITIGATION OF TENS OF THOUSANDS OF PREVIOUSLY DENIED AND CLOSED CLAIMS

A. Longshore Act Procedures Apply

Following disruptive litigation in 1976 and 1977,[49] Congress reaffirmed its intent that all Part C claims are to be adjudicated under the Longshore Act. 33 U.S.C. §§ 919, 921, *incorporated into* 30 U.S.C. § 932(a).[50] In accordance with Longshore Act procedures and agency rules, Part C claims are filed with a Department of Labor deputy commissioner. Procedures provide the claimant with several opportunities to prove entitlement. If initial submissions do not justify an award, the claimant is afforded sixty days to submit more evidence or request a hearing. 20 C.F.R. § 725.410(c). If no action is taken with sixty days from the notice, the claim is denied by reason of abandonment. *Id.* If the claim is pursued, the mine operator becomes actively involved, *id.* §§ 725.412-.415, and after consideration of a more complete record, the deputy commissioner issues a proposed decision and order, *id.* § 725.418. The parties have thirty days to respond and may accept the decision, request further informal proceedings or an APA hearing. *Id.* § 725.419. If there is no response in the period allowed, the proposed decision and order becomes final. *Id.*; 33 U.S.C. § 921(a).

If requested by a party, the case is forwarded to an ALJ for an APA hearing. 33 U.S.C. § 919(d), *incorporated into* 30 U.S.C. § 932(a); 20 C.F.R. § 725.455. "There shall be no right to a hearing in a claim with respect to which a determination of a claim made by the deputy commissioner has become final and effective in accordance with this part." 20 C.F.R. § 725.450. The hearing is de novo and on the record. After hearing, the ALJ

49. *See, e.g., Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

50. *See* H.R. Rep. No. 864, *supra* p. 10, at 23.

issues a decision awarding or denying benefits. The decision is filed and becomes final thirty days thereafter unless appealed. 33 U.S.C. § 921(a). Appeals are taken to the Benefits Review Board and then to the circuit courts. 33 U.S.C. § 921(b), (c).

Any claimant whose claim was denied may seek a readjudication within one year from the date of the denial by proving either a mistake of fact or a change in conditions. 33 U.S.C. § 922; *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). While the passage of more than one year from a denial of a claim extinguishes that cause of action, a denied claimant may begin a new cause of action by filing an entirely new claim and proving a "material" change in conditions.[51] 20 C.F.R. § 725.309(c), (d).

Section 21(e) of the Longshore Act provides that "proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, *shall not be instituted otherwise as provided in this section*, and section 18." 33 U.S.C. § 921(e) (emphasis added).[52] Many of the cases in the *Sebben* class were denied by a deputy commissioner, many were denied by an ALJ, and the remainder were finally denied by the Benefits Review Board or a circuit court. These cases do not present the circumstances necessary to invoke district court jurisdiction as provided by section 21(e) of the Longshore Act.

51. The new claim is, of course, adjudicated under eligibility criteria applicable on the date of its filing. 20 C.F.R. §§ 718.1, 718.2. Thus, all claimants within the *Sebben* class may file a new claim at this time if there has been a material change in conditions since denial of a prior claim, but the new claim would not be considered under the Department of Labor interim presumption. No interim presumption may apply in any claim filed after March 31, 1980. 20 C.F.R. § 718.2.

52. Section 21(d) of the Longshore Act authorizes a district court to enforce compliance with a final order "[i]f the court determines that the order was made and served in accordance with law . . . ." Section 18 of the Longshore Act authorizes a district court to enter a default judgment against an employer that has refused to pay an award. Neither section 18 nor 21(d) permits the district court to disturb the order itself.

B. The Longshore Act Bars the Relitigation of Closed Claims

Where Congress establishes comprehensive statutory review procedures governing the litigation of a particular subject matter, "those procedures are to be exclusive," even if Congress has not said so. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). Longshore procedures are comprehensive and complete.[53] Congress has expressly provided that they shall be exclusive. 33 U.S.C. § 921(e). This Court has recognized that the Longshore Act scheme divests the district courts of the traditional bases for jurisdiction in matters arising under it. *Crowell* v. *Benson*, 285 U.S. 22, 46-47, 50-53 (1932).[54]

The circuit courts have consistently and, before *Sebben*, uniformly held that the district courts have no jurisdiction to consider Part C claims issues.[55] Further, the circuit courts have consistently held that the Longshore Act's time limitations are

53. All privately funded workers' compensation programs administered by the Department of Labor are governed by the Longshore Act. In addition to the Longshore Act and the Black Lung Benefits Act, these include the Defense Base Act, 42 U.S.C. § 1651; the War Hazards Compensation Act, 42 U.S.C. §§ 1701-1717; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331; the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171; the District of Columbia Workers' Compensation Act, for claims filed prior to July 1, 1980. 36 D.C. Code §§ 501-504 (1973 ed.) (repealed).

54. Although Longshore procedures have changed since *Crowell*, the principle announced there has ever greater force today. In a recent unpublished opinion, the District of Columbia Circuit observed, "In 1972, however, Congress amended 33 U.S.C. § 921 to specifically remove district court jurisdiction, create the Benefits Review Board, and to provide for direct review of final Board orders in the court of appeals . . . ." *Lumberman's Mutual Casualty Co.* v. *Brock*, No. 86-5718, slip op. at 5 (D.C. Cir. Mar. 24, 1987) (unpublished). *See City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979).

55. *See Connors* v. *Tremont Mining Co.*, 835 F.2d 1028 (3rd Cir. 1987) (Longshore Act precludes federal question jurisdiction under 28 U.S.C. § 1331, and under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461); *Louisville and Nashville R.R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (Longshore Act precludes jurisdiction under 28 U.S.C. §§ 1301, 1337, and 1361); *Compensation Dep't of Dist. Five, United Mine Workers of America* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981) (Longshore Act precludes jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702).

jurisdictional and may not be waived for any reason.[56] The Iowa district court was correct in holding that it had no jurisdiction to intrude. The Eighth Circuit has violated the express mandate of the statute in holding to the contrary.

The Eighth Circuit did so solely on the authority of this Court's decision in *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986). *Bowen* is not analogous. There, SSA denied disability insurance claims under a "clandestine" policy that conflicted with applicable regulations as well as the plain language of the Social Security Act. Persons affected were, as a result of the internal policy, deprived of the ability to fairly prove their claims or appeal denials in response to the policy. The lower court directed SSA to reopen and readjudicate claims denied under the secret policy. This Court noted that the time limits imposed under the Social Security Act for the exhaustion of administrative remedies are waivable, not jurisdictional, periods of limitation. Indeed, the Social Security Act so provides. 42 U.S.C. § 405(g). Because of the obvious unfairness of SSA's policy, this Court concluded that for some SSA claimants in the class, an equitable tolling of the SSA time limitations was justified and, for others, lifting the exhaustion requirement was appropriate. *Bowen* v. *City of New York*, 106 S. Ct. at 2031-32.

Although the Social Security Act authorizes a waiver of time limitations, the Longshore Act does not. Section 21(a) of the Longshore Act provides that "[a] compensation order shall become effective when filed in the office of the deputy commissioner . . . and, unless proceedings for the suspension or setting

56. *See Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs*, 798 F.2d 215 (7th Cir. 1986); *Midland Insurance Co.* v. *Adam*, 781 F.2d 526 (6th Cir. 1985); *Dawe* v. *Old Ben Coal Co.*,754 F.2d 225 (7th Cir. 1985); *Clay* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 501 (8th Cir. 1984); *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983); *Wellman* v. *Director, Office of Workers' Compensation Programs*, 706 F.2d 191 (6th Cir. 1983); *Insurance Company of North America* v. *Gee*, 702 F.2d 411 (2d Cir. 1983); *Blevins* v. *Director, Office of Workers' Compensation Programs*, 683 F.2d 139 (6th Cir. 1982); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 244 (1977).

aside of such order are instituted as provided in subdivision (b) of this section, *shall become final at the expiration of the thirtieth day thereafter*." 33 U.S.C. § 921(a) (emphasis added). This provision does not permit a waiver of the time limitations. Its language is mandatory. Similarly, section 21(c) cuts the district courts out of the proceedings and reflects the jurisdictional nature of the time limitations on a party's access to the courts. 33 U.S.C. § 921(c). It provides that a party dissatisfied with an order of the Board may obtain review in the circuit court "by filing in such court within sixty days a written petition praying that the order be modified or set aside" and *"[u]pon such filing, the court shall have jurisdiction of the proceeding."* *Id.* (emphasis added).

There is no language in these provisions that allows equitable waiver. The Eighth Circuit overlooks this point and assumes that the principle of *Bowen* v. *City of New York* is freely applicable outside the Social Security Act. *Bowen* suggests no such conclusion. As a matter of sound judicial policy, the freewheeling waiver of jurisdictional limitations is wholly incompatible with the rights of the private parties obligated to pay benefits in black lung or longshore claims. *See Crowell*, 285 U.S. at 47. In *Crowell*, this Court observed:

> The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the [compensation] plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded.
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> —

Id.

The Black Lung/Longshore scheme presented here stands in stark contrast to that reviewed in *Bowen*. Section 21(e) of the Longshore Act precludes traditional bases for district court jurisdiction outside of prescribed statutory procedures. Section 21(e) is not an exhaustion provision; it is a prohibition that the

Eighth Circuit clearly violated in *Sebben*. Even if it were possible to overcome the jurisdictional prohibition of section 21(e), or to find a basis for waiver of exhaustion requirements, the Pittston Coal Group and co-petitioners do not waive exhaustion in those claims involving their potential liabilities. It would, at this late date, be impossible to defend many of those claims.

Were this Court to find statutory comparability between the Longshore Act and the Social Security Act, the circumstances presented here are not at all similar to those in *Bowen* v. *City of New York*. Nothing was hidden in the Labor Department's promulgation of section 727.203. It is a published rule and was the subject of extensive notice and comment. Its ten-year requirement is not ambiguous. Any claimant with fewer than ten years of coal mine employment had ample opportunity either to challenge the requirement[57] or to prove eligibility by alternative means. 20 C.F.R. § 727.203(d); *see also Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984). The fact that any particular claimant failed to pursue these avenues is in no way the responsibility of the Labor Department and does not justify the exceptionally onerous consequences of *Sebben* for mine owners, state insurance funds, or commercial insurers.

C. The *Sebben* Claims Are Also Barred By Res Judicata

The Longshore Act establishes a principle of finality of decision that has been recognized by this Court. *Crowell*, 285 U.S. at 47-58. This principle is dispositive of this case. The Eighth Circuit ignored this principle and erred in doing so. Res judicata also should be applied to accomplish a just result.

"There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*'." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Res judicata applies to the actions of administrative agencies if (1) the agency is acting

57. The Benefits Review Board first addressed the issue in 1981 in *Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 Black Lung Reporter (MB) 1-125 (Benefits Review Board 1981), and presumably ALJs were presented with the question well before that.

in a judicial capacity, (2) the agency properly resolves disputed issues of fact, and (3) the parties have had an adequate opportunity to litigate. *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3226 (1986); *see also United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 421-422 (1966). The treatises are in accord.[58] *See* 4 K. Davis, Administrative Law Treatise § 21.9, at 78 (2d ed. 1983); Restatement (Second) of Judgments § 83, at 269 (1982).

In black lung claims there is no doubt that the agency is acting in a judicial capacity. As to the previously denied claims in the *Sebben* class, there is no suggestion that the agency failed to resolve disputed facts or failed to provide the claimant an adequate opportunity to litigate. Each claimant in the *Sebben* class had more than ample opportunity to prove the existence of total disability or death due to black lung disease. Each failed in that proof, many before ALJs and on appeal. Many times employer's counsel produced substantial proof of ineligibility. Many of these cases were concluded long ago. It is manifestly unfair to direct the Department of Labor and the employers simply to do it over. This is a nearly perfect administrative setting for application of the principle of res judicata, and the logic of the principle is well served here.[59]

58. The legislative history of the Administrative Procedure Act also evidences a strong policy in favor of the finality of decision. H.R. Rep. No. 1980, 79th Cong., 2d Sess., app. A at n.21 (1946), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 289 (1946). "A party cannot willfully fail to exhaust his administrative remedies . . . . If he so fails he is precluded from judicial review . . . ." *Id.*

59. The Solicitor General observes in his petition for a writ of certiorari in *Sebben* that the authorities might not extend res judicata to questions of law arising in administrative litigation. Petition at 15 n.14. It does extend so far in judicial proceedings. *Moitie*, 452 U.S. at 398. Whether a claimant's eligibility for black lung benefits is a question of law or fact is debatable, but there is no reason why res judicata should be restricted to only fact determinations in an administrative proceeding. Its logic applies to the whole case. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971) (regarding the retroactive application of judicial decisions altering a legal standard).

Res judicata does not apply if it "would be incompatible with a legislative policy." Restatement (Second) of Judgments § 83(4) (1982). The exception plainly does not apply. There is no legislative policy apparent in the Black Lung Act or Longshore Act evidencing an intent to permit the repeated litigation of claims. Abundant statutory language precludes this result. In a broader sense, it may be argued that there is a legislative policy directing the review of *Sebben* class claims under section 410.490. The existence of such a policy, however, is far from clear.

Congress authorized the Labor Department to write its own presumption. Congress mandated that the Labor rule was to be fully rebuttable, although SSA's was not. Congress and Labor had a constitutional duty to design a reasonable rule that at least minimally preserved a rational connection between proven and elemental facts. Although Congress required the reopening of many of these claims under 30 U.S.C. § 945, each of these was reopened and readjudicated under more liberal eligibility rules. It is highly unlikely, and indeed there is no indication, that Congress wanted further readjudications to be available as the courts refined and interpreted these new rules.

The policy favoring res judicata easily overcomes the unsubstantiated suggestion that the Act mandates relitigation whenever some new judicial interpretation gives claimants a still greater advantage. A contrary conclusion robs the fundamental principle of finality of considerable meaning and is a disruptive and troubling course upon which to begin.

D. The Mandamus Statute Neither Confers Jurisdiction on the District Court Nor Provides a Proper Remedy

The Longshore Act precludes district court jurisdiction under 28 U.S.C. § 1361. *Donovan*, 713 F.2d at 1245. One major purpose of the 1972 amendments to the Longshore Act was to terminate the procedure by which district courts reviewed the actions of the Secretary by writ of mandamus. *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561

F.2d 632, 638 (6th Cir. 1977). Under the Longshore Act, district courts may take jurisdiction only to enforce awards. In matters subject to the Longshore Act, there simply is no way for district courts to invoke the mandamus statute because the courts do not have any statutory basis on which to do so.[60]

Even if the district court could take jurisdiction under 28 U.S.C. § 1361, mandamus relief is inappropriate in these circumstances. *See Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). It has long been the law that a writ of mandamus may not issue to compel agency action "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised." *United States ex rel. Chicago Great W.R.R. Co.* v. *ICC*, 294 U.S. 50, 60 (1935). This remedy is restricted "in the main, to situations where ministerial duties of a nondiscretionary nature are involved .... [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958). This Court has repeatedly imposed a heavy burden on a party seeking mandamus, requiring a showing of a "clear and indisputable" right to issuance. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S.Ct. 1133, 1143 (1988) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)).[61]

In this case, the Secretary of Labor was instructed to write a set of regulations defining the term "total disability." 30 U.S.C. § 902(f)(1). The definition was to take into account five express restrictions, 30 U.S.C. § 902(f)(1)(A)-(D), (f)(2), and to

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60. For this same reason, class certification is improper. *See Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979).

61. The Brief of Respondents in Opposition at 21-22 suggests the standard for granting mandamus, at least in the circuits, has eased somewhat in recent years. While SSA matters appear to present occasional circumstances that are treated differently, there is no evolutionary trend diminishing the generally exceptional nature of the writ. *See Allied Chemical Corp.* v. *Diaflon, Inc.*, 449 U.S. 33, 36 (1980); *Maczko* v. *Joyce*, 814 F.2d 308, 310 (6th Cir. 1987); *Azurin* v. *vonRaab*, 803 F.2d 993, 995 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3264 (1987).

blend into the ultimate rules at least three statutory presumptions and several statutory rules of evidence, 30 U.S.C. §§ 921(c)(1), (2), (4), 923(b). The entitlement equations settled upon by Congress emerged from a history of heated controversy and may not have reflected a clear meeting of the minds between the House and Senate. The course the Secretary had to follow was hardly free from doubt or clearly nondiscretionary. *See Chevron, U.S.A.*, 467 U.S. at 842-44. Hundreds of people representing the views of the agency, congressional committees involved, and diverse constituencies participated in both the statutory and regulatory process. Throughout this process, Labor provided key members of Congress the opportunity to specially comment on the regulatory product. Consigning virtually all this to irrelevancy, the *Sebben* court declared the Secretary of Labor's careful effort to have been misguided. It invoked mandamus powers to fashion its own regulatory product, nine years after the fact, without the jurisdiction or authority to do so.

The Act did not direct the Secretary to adopt section 410.490; the Secretary clearly had room for the exercise of discretion. The Secretary exercised this discretion to accommodate important competing interests, statutory requirements, scientific considerations, and the rights of all parties. This classic exercise of discretion is not subject to the mandamus powers of the district courts. To hold otherwise reduces the extraordinary writ of mandamus to an ordinary remedy and justifies judicial intervention into basic agency decisionmaking to a degree not contemplated within our system of governance.

CONCLUSION

The judgment of the Fourth Circuit, insofar as it holds invalid the Secretary of Labor's interim presumption, should be reversed. The judgment of the Eighth Circuit ordering the Secretary of Labor to readjudicate tens of thousands of previously denied and closed black lung claims should be reversed as well.

Respectfully submitted,

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Nos. 87-821, 87-827, and 87-1095

In the Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 402(f)(2) of the Black Lung Benefits Act, which provides that the "criteria" applied to certain claims adjudicated by the Secretary of Labor "shall not be more restrictive" than the criteria applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, requires that, in addition to applying medical criteria no more restrictive than HEW's, the Department of Labor also must apply evidentiary rules and adjudicatory standards no more restrictive than HEW's.

2. Whether the Eighth Circuit erred in holding that a writ of mandamus should issue directing the Secretary of Labor to reopen thousands of claims for black lung benefits that had been finally denied before that court concluded that the Secretary had erroneously construed Section 402(f)(2).

PARTIES TO THE PROCEEDING

In addition to James Sebben (whose actual name, Seddon, has been misspelled throughout this litigation), John Cossolotto, Bruno Lenzini, and Charles Tonelli, on behalf of themselves and all others similarly situated, brought suit in the United States District Court for the Southern District of Iowa; they are respondents in both No. 87-821 and No. 87-827. They named as defendants the Secretary of Labor (currently Ann McLaughlin, who replaced Dennis E. Whitfield, the Deputy Secretary of Labor, and William E. Brock, III, the former Secretary of Labor), the Department of Labor, and Steven Breeskin, Deputy Commissioner of the Department's Division of Coal Mine Workers' Compensation; the defendants are petitioners in No. 87-827. Pittston Coal Group, Barnes & Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company, and Pennsylvania National Insurance Group intervened in the Eighth Circuit; they are petitioners in No. 87-821.

In addition to the petitioner, the Director of the Department of Labor's Office of Workers' Compensation Programs, and respondent Charlie Broyles, Lisa Kay Colley is a respondent in No. 87-1095.

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OPINIONS BELOW

The opinion of the Eighth Circuit in *Sebben* (87-827 Pet. App. 1a-18a) is reported at 815 F.2d 475. The opinion

of the United States District Court for the Southern District of Iowa (87-827 Pet. App. 19a-22a) is unreported.

The opinion of the Fourth Circuit in *Broyles* (87-1095 Pet. App. 1a-6a) is reported at 824 F.2d 327. The decisions of the Benefits Review Board (87-1095 Pet. App. 7a-9a (*Broyles*) and 18a-21a (*Colley*)) are unreported, as are the decisions of the administrative law judges (87-1095 Pet. App. 10a-17a (*Broyles*) and 22a-28a (*Colley*)).

JURISDICTION

The judgment of the Eighth Circuit in *Sebben* was entered on March 25, 1987. The order denying the Secretary's petition for rehearing was entered on June 25, 1987 (87-827 Pet. App. 23a). The order denying the intervenors' petition for rehearing was entered on July 24, 1987 (87-821 Pet. App. 18a). On September 17, 1987, Justice Blackmun extended the time for filing petitions for a writ of certiorari to and including November 20, 1987. Both the Secretary's and the intervenors' petitions were filed on that date. This Court granted the petitions and consolidated them on February 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the Fourth Circuit in *Broyles* was entered on July 31, 1987. A petition for rehearing was denied on September 30, 1987 (87-1095 Pet. App. 29a-30a). The petition for a writ of certiorari was filed on December 29, 1987. The Court granted the petition and consolidated it with Nos. 87-821 and 87-827 on April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), HEW's "interim" regulation, 20 C.F.R. 410.490, and Labor's "interim" regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief (App., *infra*, 1a-8a).

STATEMENT

1. *Statutory and regulatory framework.* Under the Black Lung Benefits Act,[1] 30 U.S.C. (& Supp. III) 901 *et seq.*, "[d]isability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5.[2] Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973,

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[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, was amended by and became known as the Black Lung Benefits Act in 1972. See Pub. L. No. 92-303, 86 Stat. 150, 30 U.S.C. (& Supp. III) 901 *et seq.* It subsequently was amended by the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a) and (d), 100 Stat. 312, 313.

[2] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal mine dust and asbestos. See Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal mine dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 410.401(b), 727.202, 718.201) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct, as did this Court in *Mullins Coal Co.*

under Part B of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid from the general revenues of the United States. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under Part C of the Act, are considered by the Department of Labor (30 U.S.C. 902(c)) and individual coal mine operators bear primary responsibility for paying benefits (30 U.S.C. 932(b)).[3]

a. *HEW's regulations.* From its 1969 enactment until its 1978 amendment, the Black Lung Benefits Act provided that "the term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare." See 30 U.S.C. (1976 ed.) 902(f). After HEW defined "total disability" as the inability to engage in any substantial gainful activity (see 20 C.F.R. 410.402(b) (1971)), Congress in 1972 provided that a miner should be considered totally disabled whenever he is unable to perform work comparable to his usual coal mine work. 30 U.S.C. 902(f)(1)(A). Congress at that time also liberalized the coverage of the program in several other respects.[4] HEW thereafter promulgated an amended set of regulations, known as its "permanent" regulations, which

[3] In certain cases, the Black Lung Disability Trust Fund, which the coal mining industry finances through an excise tax on coal and the Director of the Office of Workers' Compensation Programs administers, pays Part C benefits. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

[4] Among other changes, Congress directed that benefits should not be denied solely on the basis of a negative X-ray. 30 U.S.C. 923(b). It further provided that a miner should be presumed to be entitled to benefits, despite an X-ray that was negative for complicated pneumoconiosis, if he had worked in coal mines for 15 years and other medical evidence demonstrated that the miner had a totally disabling pulmonary impairment. 30 U.S.C. 921(c)(4). Congress repealed that presumption in 1981. Pub. L. 97-119, § 202(b)(1), 95 Stat. 1643.

governed the Part C program as well as the Part B program. Under those regulations, ventilatory and blood-gas studies and evidence of certain heart abnormalities could justify a finding of total disability. 20 C.F.R. 410.424, 410.426(b) & Subpt. D App.[5] In addition to proving that they were totally disabled, claimants also had to establish that they had pneumoconiosis and that their disability arose out of their coal mine employment.

In 1972, at the same time that it promulgated its permanent regulations, HEW promulgated an "interim" regulation applicable only to Part B claims. 20 C.F.R. 410.490(b). The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate claimants. *Mullins Coal Co.*, slip op. 16-17; 20 C.F.R. 410.490(a). It provided a rebuttable presumption that a claimant was totally disabled due to pneumoconiosis where he (a) presented X-ray, biopsy, or autopsy evidence establishing the existence of pneumoconiosis (20 C.F.R. 410.490(b)(1)(i)) or, in the case of one employed as a miner for at least ten years,[6] presented ventilatory study scores showing impairment (20 C.F.R. 410.490(b)(1)(ii)),

[5] Ventilatory studies, which measure the ability of the lungs to move air in and out, may establish the presence of a respiratory or pulmonary disease that may or may not be pneumoconiosis. Blood-gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood. See *Mullins Coal Co.*, slip op. 5; Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 737-743 (1981).

[6] HEW's interim regulation is somewhat unclear as to how long a claimant had to work in coal mines to establish the interim presumption by means of ventilatory studies. In one part it requires 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later apparently requires only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)).

and (b) demonstrated that the impairment arose out of coal mine employment (20 C.F.R. 410.490(b)(2)). The ventilatory study scores in the interim regulation required claimants to show a much less severe degree of impairment than was required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). With respect to causation, while claimants presenting ventilatory study scores, but not X-ray evidence, could establish the presumption only if they had worked in coal mines for ten years, it was presumed that their pneumoconiosis arose out of coal mining (20 C.F.R. 410.490(b)(3)). Claimants presenting X-ray, biopsy, or autopsy evidence of pneumoconiosis would be presumed to have shown causation if they had worked in coal mines for ten years. 20 C.F.R. 410.416, 410.456, 410.490(b)(2). Claimants presenting X-ray, biopsy, or autopsy evidence who had not worked in coal mines for ten years could also establish the presumption by proving causation in other ways (*ibid.*).[7]

The interim regulation specifically provided that, if the presumption was invoked, it could be rebutted by evidence that the miner was doing work comparable to his or her usual coal mine work or was able to do so. 20 C.F.R. 410.490(c). If a miner failed to invoke the presumption, he

[7] While the regulation did not specifically address how a miner with fewer then ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant could establish causation by showing that exposure to lung irritants other than coal mine dust was not the likely cause of his pneumoconiosis. HEW required claimants with five to nine years of coal mine employment to show that they had fewer than ten years of work in another job involving exposure to dust hazards. Claimants with fewer than five years of coal mine employment had to show that the disease arose within five years of that employment. See *Report of the Comptroller General of the United States, Examination of Allegations Concerning Administration of the Black Lung Benefits Program* 3 (1976).

nevertheless could establish that he qualified for benefits under HEW's permanent regulations. 20 C.F.R. 410.490(e).[8]

b. *Labor's regulations.* Prior to 1978, the Department of Labor, in adjudicating Part C claims, applied HEW's permanent regulations (see 20 C.F.R. 718.2 (1976)), but not its interim presumption, which by its terms applied only to Part B claims (20 C.F.R. 410.490(b)). By amendments enacted in 1978, Congress gave the Secretary of Labor authority to issue regulations defining "total disability" under the Part C program by directing the Secretary to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. 902(f)(1)(D). In addition, Congress instructed the Secretary to reopen claims that had been denied before the effective date of the 1978 amendments. 30 U.S.C. 945. It provided in Section 402(f)(2), 30 U.S.C. 902(f)(2), that, in adjudicating the reopened claims and claims filed before the promulgation of final Labor Department regulations, the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Thus, Labor was to apply "criteria" no more restrictive than those applied by HEW, including the criteria in its interim regulation, to claims filed before it promulgated final regulations, which were promulgated on April 1, 1980.

[8] For example, a claimant who worked fewer than ten years in coal mines and did not have X-ray evidence of lung damage, but did have a ventilatory study score showing a significant pulmonary disability, would not qualify under HEW's interim presumption, but might qualify under HEW's permanent regulations. See 20 C.F.R. 410.414, 410.426(b).

The Secretary of Labor promulgated interim regulations in 1978 to govern the claims Congress ordered reopened and those filed before final regulations were promulgated. The regulations included an "interim presumption" of total disability from pneumoconiosis arising from coal mine employment—and thus of entitlement to benefits—applicable in circumstances that are similar, but not identical, to those set out in HEW's interim regulation. 20 C.F.R. 727.203. It provides, like HEW's interim regulation, that claimants may utilize X-ray, biopsy, or autopsy evidence or ventilatory studies satisfying medical criteria identical to those in HEW's interim regulation to establish the presumption. 20 C.F.R. 727.203(a)(1) and (2). It goes beyond HEW's regulation in allowing the presumption to be triggered by blood-gas studies, by other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, the presumption of entitlement could be established under Labor's interim regulation only by claimants who worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, claimants who worked in coal mines for fewer than ten years and presented X-ray evidence showing pneumoconiosis could not, as under HEW's interim regulation, gain the benefit of the presumption of entitlement by relying on other evidence to show causation. In that event, they could not trigger the presumption at all.[9]

[9] Miners with fewer than ten years' experience in coal mines could, however, qualify for benefits by proving, apart from any presumption, that they were totally disabled as a result of pneumoconiosis arising out of coal mine employment. The Benefits Review Board does not apply the rules HEW applied in cases involving miners with fewer than ten years' experience (see note 7, *supra*), but instead has held that competent medical advice is sufficient to prove causation regardless of how many years a claimant worked in coal mines in cases where multiple causes are possible. See *Collura* v. *Director, Office of Workers' Compensation Programs,* 6 B.L.R. 1-100, 1-103 (1983), aff'd in part, petition dismissed without published opinion, 738 F.2d 421 (3d Cir. 1984). It is also the position of the Director of the Office of Workers' Compensation Programs that lay testimony is sufficient to prove causation from coal mine employment in cases where the evidence does not suggest other causes of the disease.

Like HEW's interim regulation, Labor's interim regulation provided that the presumption could be rebutted by proof that a claimant was doing or was capable of doing his usual coal mine work or work comparable to it. 20 C.F.R. 727.203(b)(1) and (2). Labor's interim regulation also provided that the presumption could be rebutted by proof that a claimant's disability did not arise in whole or in part out of coal mine employment or that the miner did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).[10] Labor's interim regulation also provided that anyone failing to qualify for the presumption of eligibility could seek to establish eligibility under Labor's final regulations (20 C.F.R. 727.203(d)), which are set forth at 20 C.F.R. Pt. 718. Claims filed after April 1, 1980, are adjudicated under those final regulations, which do not contain a presumption of entitlement comparable to HEW's interim presumption or Labor's interim presumption.

2. *The merits issue.* Charlie Broyles and Bill Colley

[10] Labor construed its interim presumption to shift the burden of persuasion, not merely the burden of production. *Mullins Coal Co.,* slip op. 7 n.12. It is not clear whether HEW's interim regulation shifted the burden of persuasion. Other presumptions in the Black Lung Benefits Act have been construed as shifting only the burden of production. *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 27 (1976); *Prokes* v. *Mathews,* 559 F.2d 1057, 1060 (6th Cir. 1977); but see *Alabama By-Products Corp.* v. *Killingsworth,* 733 F.2d 1511, 1514-1515 (11th Cir. 1984).

filed claims for black lung benefits under the Part C program before Labor's final regulations took effect in 1980. Both submitted X-rays showing the presence of pneumoconiosis. Because neither had ten years of coal mine employment, neither could invoke the presumption of entitlement under Labor's interim regulation.

An administrative law judge determined that Broyles had worked for five years as a coal miner from 1946 to 1952, after which he worked over 20 years at other occupations involving exposure to dust (87-1095 Pet. App. 11a-12a). Although the administrative law judge found it unclear which occupation had caused Broyles' pneumoconiosis, he gave Broyles "the benefit of the doubt" and concluded that coal mining had caused it (*id.* at 16a). The administrative law judge also assumed that Broyles, who retired in 1976 following coronary bypass surgery (*id.* at 14a-15a), was totally disabled. However, relying on physicians' reports, the administrative law judge denied Broyles' claim because his disability was not due to pneumoconiosis, but instead was caused by his heart condition (*id.* at 16a). The Benefits Review Board affirmed (*id.* at 7a-9a).

The administrative law judge determined that Colley, who had arthritis, chronic bronchitis, and had suffered a stroke in 1978 (87-1095 Pet. App. 26a, 27a), had worked in coal mines for no more than nine and a half years between 1945 and 1962 (*id.* at 24a-25a). The administrative law judge found it "questionable" whether the X-ray Colley had submitted showed that he had pneumoconiosis (*id.* at 25a), but denied the claim on the basis of physicians' reports supporting the conclusion that Colley's pulmonary condition was not causally related to his prior coal mine employment (*id.* at 28a). The Benefits Review Board affirmed (*id.* at 18a-21a).

The Fourth Circuit consolidated the two cases.[11] It reversed on the ground that in each case the administrative law judge "erred in failing to evaluate the claims under [HEW's interim regulation], 20 C.F.R. § 410.490" (87-1095 Pet. App. 2a). Relying on *Halon* v. *Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs,* 757 F.2d 966 (8th Cir. 1985), the court concluded that Labor's interim presumption regulation is contrary to Section 402(f)(2)'s directive that the Secretary apply "criteria" that are not more restrictive than the criteria applied by HEW in its interim regulation (87-1095 Pet. App. 5a).[12] The court found Labor's interim regulation inconsistent with the statute because, under HEW's interim regulation but not under Labor's interim regulation, claimants such as Broyles and Colley, who submitted X-rays showing pneumoconiosis, could invoke the presumption of entitlement to benefits even if they had worked in coal mines for fewer than ten years. It rejected the Secretary's argument that Congress intended in Section 402(f)(2) that the Department of Labor should apply *medical* criteria no more restrictive than those applied by HEW to claims filed before Labor's permanent regulations were in place, but that Congress did not intend to require Labor to apply the same evidentiary standards and adjudicatory rules applied by HEW (87-1095 Pet. App. 5a).[13] The court remanded for reevaluation of Broyles' and Colley's claims (*id.* at 6a).

[11] Lisa Kay Colley was substituted as claimant for her father, who died prior to the court of appeals' decision.

[12] In a divided opinion in *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (1987), petition for cert. pending, No. 87-1045, the Sixth Circuit also followed *Halon* and *Coughlan.*

[13] In so concluding, the Fourth Circuit did not refer to the decision of the Seventh Circuit in *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395, 400 (1987), which expressly rejected the holdings in *Halon* and *Coughlan.* The Seventh Circuit

3. *The procedural issue.* The Eighth Circuit's decision in *Sebben* involves a mandamus action by four named plaintiffs on behalf of a putative class of unsuccessful claimants. The putative class members, like Broyles and Colley, had submitted X-rays showing the presence of pneumoconiosis but were denied the presumption of entitlement to benefits under Labor's interim regulation because they had not worked in coal mines for ten years (87-827 Pet. App. 18a).[14] The claims of some of the members of the putative class were denied before the 1978 amendments were enacted, reopened in light of the 1978 amendments, and again denied. Others filed claims after the 1978 amendments took effect but before the Secretary's final regulations were promulgated in 1980. The putative class members either failed to exhaust their administrative remedies or failed to seek judicial review of the final administrative denial of benefits. The plaintiffs sought to compel the Secretary of Labor to reopen the claims of the class members and reconsider them under the standard set forth in *Coughlan*. The district court denied the application for a writ of mandamus without certifying a class (87-827 Pet. App. 19a-22a).

The Eighth Circuit reversed (87-827 Pet. App. 1a-18a). It acknowledged that mandamus is warranted only where

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found "criteria," as used in Section 402(f)(2), ambiguous, noting that the final sentence of the immediately preceding subsection specifically refers to " 'criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners' " (817 F.2d at 401 (citation omitted)). Given the ambiguity, the court examined the legislative history of the provision and concluded that the Department's interpretation is consistent with the intent of Congress (*id.* at 402-404). Judge Weis, dissenting in *Halon*, had reached the same conclusion.

[14] The class is limited to those who submitted X-ray evidence, and does not include those seeking to trigger the presumption by relying on autopsy or biopsy evidence. 87-827 Pet. App. 18a.

there has been a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review' " and the agency had "a clear nondiscretionary duty to act" (*id.* at 4a (quoting *Nader* v. *Volpe*, 466 F.2d 261, 265-266 (D.C. Cir. 1972)). With respect to members of the putative class whose claims had been reopened and denied after the 1978 amendments, the court held that the Secretary has a duty to reopen them again because "[e]ven if review of those claims did occur, the Secretary did not do so under the proper standard" (87-827 Pet. App. 12a). As to claimants whose claims were first denied after the 1978 amendments, the court held that the Secretary "owes the same duty to these claimants to reopen and consider their claims" (*id.* at 12a-13a).

The Eighth Circuit rejected the argument that it should not order the claims reopened because the claimants had failed to exhaust their administrative remedies or seek review in a court of appeals in timely fashion. Without citation to any explicit legislative decision to relax the statutory deadlines, the court noted that "Congress had the authority to waive the limitation created by the deadlines" (87-827 Pet. App. 15a). With respect to those claims that had been reopened after the 1978 amendments and denied again, the court concluded that, in ordering reopening in 1978, "Congress, by implication, waived the thirty and sixty-day deadlines for appeals" (*id.* at 15a) and concluded that "[t]he Secretary has yet to take properly 'into account' the 1977 amendments" (*id.* at 16a). As to the later-filed claims, the court concluded that "[i]t would * * * be contrary to congressional intent to allow" those claims to be treated differently (*ibid.*). Furthermore, the court stated, the 30-day and 60-day deadlines "become largely unmeaningful for actions based on jurisdictional grants outside of" the Black Lung Benefits Act, such as the

mandamus statute (*id.* at 17a). It remanded the case for certification of a class whose claims the Secretary would have to reopen (*id.* at 2a n.1, 18a).

SUMMARY OF ARGUMENT

I. The Secretary of Labor reasonably concluded that Congress in Section 402(f)(2) mandated the application of medical criteria no more restrictive than those in HEW's interim regulation, but did not require the Department of Labor to apply other aspects of HEW's interim regulation. Section 402(f)(2)'s requirement that Labor apply no more restrictive "criteria" is set forth as part of the definition of "total disability," and while medical evidence is plainly relevant to that issue, a miner's years of service bear primarily on the question of causation. The structure of the statute therefore suggests that the term "criteria" as used in defining "total disability" means medical criteria only, and it was reasonable to conclude that miners with fewer than ten years of coal mine experience could be denied the opportunity to invoke a presumption of entitlement to benefits.

The legislative history also supports this conclusion. It shows that the language of Section 402(f)(2) was proposed in response to testimony that the ventilatory study scores applied by Labor in adjudicating Part C claims required a greater degree of impairment than was required under Part B and that, as a result, the approval rate was much lower under the Part C program. The House reports make clear that it intended to require Labor to apply *medical* criteria no more restrictive than those applied by HEW. The Senate, apparently more impressed than the House by testimony that the discrepancy in approval rates between the Part B and Part C programs was due to the unwarranted laxness of the ventilatory study scores in

HEW's interim regulation, passed a bill giving the Secretary of Labor authority to promulgate new medical criteria. The Conference Committee incorporated both approaches. In Section 402(f)(1)(D), following the Senate approach, it provided that the Secretary of Labor was to "establish [new] criteria for all appropriate medical tests." In Section 402(f)(2), which immediately follows Section 402(f)(1)(D), it adopted the House approach pending promulgation of these new criteria by providing that Labor was to apply "criteria" no more restrictive than those in HEW's interim regulation to claims filed before the final regulations were promulgated. In light of this history of the enactment of the language of Section 402(f)(2), the Secretary reasonably construed the word "criteria" to be shorthand for the phrase "criteria for all appropriate medical tests" in the preceding sentence.

Moreover, it is especially unlikely that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience since the evidence before Congress showed that miners with fewer than ten years of coal mine experience rarely contract black lung disease. The Conference Report stated that all regulatory presumptions were to include the statutory presumption that pneumoconiosis resulted from coal mine employment where a miner had worked ten years in coal mines, and that is what Labor's interim regulation provided. Furthermore, the House Committee approved Labor's interim regulation after reviewing it and noting that the interim presumption could be established only by miners with ten years' experience.

In light of the statutory language and its legislative history, the Secretary's construction of the term "criteria" in Section 402(f)(2) is more plausible than that adopted by the Fourth Circuit. The Secretary's construction is at least a permissible construction, so the Fourth Circuit erred by failing to defer to it.

II. Assuming that the Secretary's construction of Section 402(f)(2) is erroneous, the Eighth Circuit nevertheless erred in holding that a writ of mandamus should issue ordering the reopening of claims that had been finally denied. Mandamus is warranted only where the defendant owes the plaintiff a clear nondiscretionary duty. Mandamus is not warranted where the interpretation of a statute is a prerequisite to the establishment of the duty that is said to be owed, because, in such a case, no *clear* duty is owed, and Section 402(f)(2) does not plainly require the construction respondents favor. In any event, the Secretary has no duty to reopen the claims of the members of the putative class. The 1978 amendments required the reopening of certain claims, but those claims were reopened; the amendments did not require any further reopening.

Mandamus is also unavailable because members of the putative class failed to appeal adverse decisions, and exhaustion of statutory remedies is a prerequisite to mandamus relief. Application of that rule is particularly sensible here because, if members of the putative class had raised their challenge to Section 402(f)(2) and pursued it administratively, cases where the construction of the statute might have made a difference would have been identified. In addition, the Eighth Circuit's reopening order flouts the statutory appeal deadlines.

The fact that members of the putative class failed to challenge the denials of their claims in timely fashion also leads to the conclusion that their claims are barred by res judicata. Where, as here, the administrative proceeding has the essential characteristics of a judicial proceeding and the plaintiffs could have advanced a legal argument in the administrative proceeding, they should be barred from raising the claim in a subsequent proceeding. Any other rule fails to establish repose and leads to costly repetitive litigation, as this case illustrates.

ARGUMENT

I. THE DEPARTMENT OF LABOR REASONABLY CONSTRUED SECTION 402(f)(2) TO REQUIRE THAT THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART C CLAIMS NOT BE MORE RESTRICTIVE THAN THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART B CLAIMS

A. *The Structure and Context Of The Statute Support The Secretary's Construction*

Although Section 402(f)(2) requires the Secretary of Labor to apply "criteria" no more restrictive than those applied by HEW to claims filed before the final regulations were promulgated, Congress did not define the term "criteria," and the proper definition cannot be discerned from the word alone.[15] The Secretary's construction—that Congress intended Labor to apply medical criteria no more restrictive than those in HEW's interim regulation to

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[15] "Criteria" is defined as "a standard on which a judgment or decision may be based" (*Webster's New Collegiate Dictionary* 307 (1983)) and its meaning varies according to what is to be judged or decided. The Sixth Circuit in *Kyle*, which held that Labor's interpretation is contrary to the statute, nevertheless conceded that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations" (819 F.2d at 142). Similarly, in *Strike*, the Seventh Circuit, which upheld the Secretary of Labor's interim regulation, stated that the "meaning of the statute is ambiguous" (817 F.2d at 401).

Representative Simon stated with respect to Section 402(f)(2) that "the language in this bill is crystal clear." 124 Cong. Rec. 3431 (1978). While Representative Simon's conclusion that the language enacted is clear beyond dispute has surely not received uniform acceptance, it is noteworthy that he thought it clear that under Section 402(f)(2) "[t]he Department of Labor is required to apply *medical* criteria no more restrictive than criteria" applied under HEW's interim regulation (*ibid.* (emphasis added)).

such claims, but did not require Labor to allow claimants with fewer than ten years' coal mine experience to establish a presumption of entitlement to benefits—is strongly supported by the structure and context of the statute.

The "no more restrictive criteria" requirement appears in Section 402(f), which is the provision of the Black Lung Benefits Act that defines "total disability." Medical evidence, like vocational evidence, is relevant to the question whether a miner is totally disabled, since the Act defines total disability as the inability to perform coal mine work or work requiring comparable abilities (Section 402(f)(1)(A)). But evidence as to how long a claimant worked in coal mines has only the most indirect bearing on the issue of total disability, as distinct from whether a claimant's pneumoconiosis arose from coal mine employment. Congress, in amending the definition of "total disability" to require the application of criteria no more restrictive than those employed under HEW's interim regulation, cannot without justification be assumed to have referred to criteria whose main relevance is to the separate issue of causation. If Congress had intended to require Labor to apply HEW's interim regulation in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision. The fact that it instead modified the definition of "total disability" supports the conclusion that it was referring to medical criteria by which that disability is to be judged, and not to adjudicatory and evidentiary rules bearing on how the pneumoconiosis came about.

B. ***The Legislative History Of Section 402(f)(2) Supports The Conclusion That "Criteria" Means Medical Criteria And Not Evidentiary And Adjudicatory Rules***

1. Congress's purpose in amending Section 402(f) in 1978 further supports the Secretary's conclusion that Congress meant "criteria" in Section 402(f)(2) to mean medical criteria and not to include adjudicatory and evidentiary rules.[16] The members of the House of Representatives who favored the 1978 amendment ultimately adopted as Section 402(f)(2) were particularly concerned that the ventilatory study scores applicable to Part C claims under HEW's permanent regulations (20 C.F.R. 410.426(b)) were much stricter than the scores applicable to Part B claims under HEW's interim regulation (20 C.F.R. 410.490(b)(1)(ii)). The amendment had its genesis in 1974, after the 1972 amendments had taken effect, when the House held hearings and a representative of the United Mine Workers complained that the approval rate for claims filed under the Part C program was much lower than the approval rate for claims filed under the Part B program. *Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 1st Sess. 351 [hereinafter *1974 Hearings*] (statement of Bedford W. Bird). The Mine Workers' representative ex-

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[16] This Court, in footnote 31 of the *Mullins Coal Co.* opinion (slip op. 22), appeared to assume that the adjudicatory and evidentiary rules in Labor's interim regulation could be no more restrictive than those in HEW's interim regulation. Neither that assumption, which was not necessary to the decision there, nor the Court's statement that Labor's interim regulation "satisfies Congress' demand that Labor's criteria 'shall not be more restrictive than the criteria applicable' " under HEW's interim presumption (slip op. 18), should be viewed as controlling this case, where the issue is actually presented.

plained that the low approval rate under the Part C program was the result of the fact that the "ventilatory test scores [in HEW's permanent regulations] are only minimally different from the scores used to evaluate permanent disability under the Social Security disability program" (*id.* at 353). He recommended that Congress enact "an explicit provision extending the so-called 'interim' *medical* criteria" (*ibid.* (emphasis added)). The Director of the Appalachian Research and Defense Fund, a legal services group that represents miners, agreed that "[t]he ventilatory study standards are what makes [*sic*] the difference" (*id.* at 398 (statement of John Rosenberg)). The Department of Labor's representative, who was criticized by some members of the committee because the medical standards applied in determining whether a miner was disabled were stricter under Part C than Part B (see *1974 Hearings* 329 (statement of Chairman Perkins) and 399 (statement of Rep. Dent)), noted that "we are only talking about one standard[,] the ventilatory [standard]." *Id.* at 398 (statement of Nancy Synder).

The House responded with bills amending the definition of total disability to require HEW to adjudicate Part C claims under standards no more restrictive than those applied to Part B claims. See H.R. 3333, 94th Cong., 1st. Sess. § 3 (1975); H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong. 1st Sess. § 7(a) (1975). The committee report to one of those bills explained that such a requirement was necessary because "the Department of Health, Education, and Welfare, exercising authority provided under the current law, has literally saddled the Department of Labor with rigid and difficult *medical* standards for measuring claimant eligibility under part C of the program. The so-called 'permanent' *medical* standards now in effect under part C are much more demanding than

the so-called 'interim' standards applied by HEW under part B of the program." H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975) (emphasis added). The report stated that the House bill "would require that standards no more restrictive than the 'interim' *medical* standards shall be equally applicable to part C claims" (*id.* at 15 (emphasis added)). These explanatory comments are identical to the comments that accompanied the version of the bill initially passed by the House. See H.R. Rep. 95-151, 95th Cong. 1st Sess. 14 (1977).[17]

Like the House, the Senate focused on the fact that HEW's interim ventilatory study scores "are far less stringent" than the scores in its permanent regulation. S. Rep. 95-209, 95th Cong., 1st Sess. 13 (1977). However, it ultimately determined not to require continued application of HEW's interim medical criteria. The Senate Report noted HEW's assertions "that the interim standards do not accurately determine actual disability, that they were used under part B only to clear away the backlog of claims arising from the 1972 amendments, and that the permanent standards more accurately identify disabling respiratory and pulmonary functions in coal miners" (*ibid.*). The report also noted that the United Mine Workers considered even HEW's interim ventilatory study scores too stringent (*ibid.*). The Senate concluded that it was "not qualified to assess the appropriateness of medical test standards to be used to determine disability in coal miners" (*ibid.*) and the bill it passed gave the Secretary of Labor authority to define the term "total disability" without reference to previously applied criteria (*id.* at 34-35).

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[17] That version of the bill would have amended Section 402(f) simply by providing that "[w]ith respect to a claim filed after June 30, 1973, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973" (H.R. Rep. 95-151, *supra*, at 52).

The Conference Committee reconciled the differing approaches of the House and Senate bills by adopting the Senate approach on a permanent basis and the House approach pending promulgation of Labor's regulations. H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978). Congress resolved the controversy over whether the ventilatory study scores used to adjudicate Part C claims were too strict or those used to adjudicate Part B claims were too lax by directing the Secretary of Labor in Section 402(f)(1)(D) to consult with the Director of the National Institute for Occupational Safety and Health and "establish *criteria for all appropriate medical tests* * * * which accurately reflect total disability in coal miners" (emphasis added)). The statute's next section, Section 402(f)(2), directed the Secretary of Labor to use the "criteria" in HEW's interim regulation in adjudicating claims filed before Labor's final regulations took effect. In light of that placement and the history of the amendment, the Secretary of Labor reasonably concluded that "criteria" in Section 402(f)(2) is shorthand for the phrase used in the preceding sentence, "criteria for all appropriate medical tests." See *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395, 401 (7th Cir.1987).[18]

[18] The Sixth Circuit suggested in *Kyle* that Congress's choice of the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) and only "criteria" in Section 402(f)(2) shows that it intended "criteria" in the latter section to have a broader meaning (819 F.2d at 143). However, nothing in the legislative history supports such a conclusion. To the contrary, the fact that the House, which drafted the language that became Section 402(f)(2), focused on the difference between the ventilatory study scores used under Part B and Part C during the 1974 Hearings and repeatedly referred to *medical* criteria in its reports (H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975); H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977)) indicates that the criteria referred to in Section 402(f)(2) are medical criteria.

2. Congress therefore gave substantial attention to the problem of the medical standards to be used in determining whether a claimant was totally disabled. There is, on the other hand, no evidence in the language of the statute or its legislative history indicating that Congress intended to require the use of the adjudicatory and evidentiary rules of HEW's interim regulation until Labor's final regulations were promulgated. In particular, there is no evidence that Congress intended to preserve the ability of miners with fewer than ten years' experience to establish the presumption of entitlement to black lung benefits contained in HEW's interim regulation. To the contrary, as the Seventh Circuit noted in *Strike* (817 F.2d at 403-404 (emphasis added)): "The only reference to the use of presumptions in the conference report stated that '[t]he conferees also intend that *all* standards are to incorporate the presumptions contained in section 411(c) of the Act [30 U.S.C. § 921(c)].' H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 * * *. That Section creates a rebuttable presumption that pneumoconiosis arose out of coal mine employment '[i]f a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines.' 30 U.S.C. § 921(c)(1)." It is precisely that requirement of ten years' coal mining experience that was "expressly incorporate[d]" (817 F.2d at 404) into the Secretary of Labor's interim regulation.

Moreover, the summary of medical knowledge on coal worker's pneumoconiosis appended to the final House report concluded that there was broad agreement that "[t]he probability that coal miners will develop black lung increases regularly after about ten years of working underground." H.R. Rep. 95-151, *supra*, at 30. It added that the

study "with the most carefully selected samples of miners" showed that " '[t]here was little pneumoconiosis until miners had worked at least eleven years in the mines' " (*ibid.* (citation omitted)). In view of that recognition by the House, it would be surprising if Congress simultaneously acted to mandate the use of a presumption of entitlement to black lung benefits for miners with fewer than ten years' experience.[19]

Furthermore, post-enactment legislative history demonstrates that the Congress that adopted Section 402(f)(2) was not concerned with the adjudicatory and evidentiary rules used by HEW. Shortly after the 1978 amendments were enacted, the members of the House Committee reviewed and commented on Labor's interim regulation before it was adopted in final form. See *Strike*, 817 F.2d at 404; *Halon*, 713 F.2d at 30 (Weis, J., dissenting). The committee stated that it "strongly supports the

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[19] The Sixth Circuit in *Kyle*, like most of the other courts that have held that Labor's interim regulation is inconsistent with Section 402(f)(2), relied on the assertion that the "general purpose" of the 1978 amendments "appears to have been to liberalize the standards under which black lung benefits were being awarded at the time" (819 F.2d at 142). That statement is not entirely accurate and certainly does not compel the conclusion that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience. Congress heard evidence both that HEW's permanent ventilatory study standards were too strict and that HEW's interim ventilatory study standards were too lax. It ultimately responded by instructing Labor to devise new medical standards, which is not a liberalizing of the standards. In the interim, it instructed Labor to apply HEW's interim ventilatory study standards, which did have a liberalizing effect. But that does not indicate that Congress intended to mandate that miners with fewer than ten years' experience be allowed to establish a presumption of entitlement to benefits, and it is improbable that it so intended in light of the evidence before it that those miners were unlikely to suffer from black lung disease.

re-promulgation of the interim standards, as found in Section 727.203(a)" (87-821 Pet. App. 44a). It expressly recognized that ten years of coal mine employment was required to invoke the presumption in that section (*id.* at 46a) and never hinted that that requirement violated the statute. These comments are entitled to considerable weight since they reflect the contemporaneous view of the authors of the legislation. *North Haven Board of Education* v. *Bell,* 456 U.S. 512, 526-527, 533-534 (1982); *Talley* v. *Mathews,* 550 F.2d 911, 920 (4th Cir. 1977)). They further confirm the correctness of Labor's interpretation. See *Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624, 634 (1984).

Finally, it has been contended that Labor's interim regulation is also invalid in that it authorizes rebuttal by two methods not explicitly set forth in HEW's interim regulation, which explicitly allows rebuttal only on the ground that the claimant is doing or is capable of doing his usual coal mine work. 20 C.F.R. 410.490(c). See page 9, *supra.* This issue is pending in the Sixth Circuit in *Youghiogheny & Ohio Coal Co.* v. *Miliken,* No. 88-3213, and *Grant* v. *Director, Office of Workers' Compensation Programs,* No. 87-3674; see also *Sulyma* v. *Director, Office of Workers' Compensation Programs,* 827 F.2d 922, 924 (3d Cir. 1987).[20] If HEW's interim regulation really confines rebuttal evidence to that which it specifically authorizes, and if Section 402(f)(2) requires Labor to apply the adjudicatory and evidentiary rules embodied in HEW's interim regulation, Labor's inclusion of additional rebuttal methods does, indeed, make its regulation "more restrictive" than HEW's and thus is contrary to the

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[20] The issue was raised but not decided in *Consolidation Coal Co. v. Smith,* 837 F.2d 321 (8th Cir. 1988).

statute.[21] We submit that Congress could not have intended such a result, and that this fact gives further support to the Secretary's interpretation of the statute.

Specifically, such an argument suggests that Labor's interim regulation is invalid insofar as 20 C.F.R. 727.203(b)(3) and (4) authorize rebuttal by showing that the claimant's disability did not arise out of coal mine employment or is not due to pneumoconiosis. However, Congress enacted the Black Lung Benefits Act to provide benefits to a coal miner "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment" (*Mullins Coal Co.*, slip op. 5). To deny coal mine operators the ability to prove that a claimant does not have pneumoconiosis or that his disability did not arise out of coal mine employment would therefore appear to be irrational and perhaps even suspect on due process grounds. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-37 (1976) (construing Section 411(c)(4) not to limit the evidence a coal mine operator may present on

[21] The Department of Labor does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive. See 43 Fed. Reg. 36826 (1978). The Benefits Review Board, however, thinks that HEW's interim regulation did not allow for rebuttal by proof that the claimant did not have pneumoconiosis or the claimant's disability did not arise out of coal mine employment. *Whiteman* v. *Boyle Land & Fuel Coal Co.*, No. 87-348 BLA (May 2, 1988), slip op. 3. At the same time, though, the Board believes that HEW's interim regulation cannot be applied to Part C claims because coal mine operators were not given the opportunity to comment on it as required by the Administrative Procedure Act and that the additional rebuttal methods in Labor's regulation should be applied (*id.* at 3-4).

rebuttal, thus avoiding a constitutional challenge); *Mullins Coal Co.*, slip op. 22 n. 32. It would also appear to be contrary to the statutory command that "all relevant evidence shall be considered." 30 U.S.C. 923(b); *Mullins Coal Co.*, slip op. 13. To avoid these problems, it is sensible to construe the reference to "criteria" in Section 402(f)(2) as encompassing medical standards, but not adjudicatory or evidentiary rules.[22]

C. *The Secretary's Interpretation Of Section 402(f)(2) Is Entitled To Deference*

The Department of Labor's construction of "criteria" in Section 402(f)(2) as referring to medical criteria, but excluding evidentiary and adjudicatory rules is more consistent with the language of the statute and its legislative history than the alternative interpretation the Fourth Circuit adopted. In addition, Labor's interpretation in its 1978 regulation of a term added in the 1978 amendments represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); see also *Morrison-Knudsen Contruction Co.* v. *Director, Office of*

[22] The Sixth Circuit, while holding in *Kyle* that Labor's interim regulation is contrary to Section 402(f)(2) because it does not allow claimants with fewer than ten years of coal mine work to invoke the presumption of total disability, suggested that Labor's interim regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. 819 F.2d at 144; see also *Warman* v. *Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n.1 (6th Cir. 1988); *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 490 (6th Cir. 1985). The court did not explain why it was permissible for Labor's interim regulation to be more restrictive in authorizing additional rebuttal methods.

Workers' Compensation Programs, 461 U.S. 624, 635 (1983). And where " 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *NLRB* v. *United Food Workers Union, Local 23,* No. 86-594 (Dec. 14, 1987), slip op. 10 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Since Labor's contemporaneous construction of Section 402(f)(2) is reasonable, that construction is entitled to deference.

II. THE EIGHTH CIRCUIT ERRED IN ORDERING THE REOPENING OF FINAL, DENIED CLAIMS

If this Court holds that the Secretary of Labor permissibly construed Section 402(f)(2), then the Eighth Circuit plainly erred by ordering the reopening of the putative class members' claims. However, as explained below, assuming arguendo that Labor erroneously interpreted Section 402(f)(2), the Eighth Circuit nevertheless erred in ordering the reopening of thousands of claims that had been finally denied. And that error, if uncorrected, will have serious consequences on the system by which black lung claims are presently resolved. As explained in our petition for a writ of certiorari (87-827 Pet. 10-12), approximately 94,000 claims, most of which were finally denied more than six years ago, will have to be reopened if the Eighth Circuit's decision is affirmed and a nationwide class is certified. Since administrative law judges currently issue about 10,000 decisions each year in black lung cases, such a massive reopening effort would very likely create a significant backlog in a system that is already severely backlogged. See *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the*

House Comm. on Government Operations, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Hearing*]; *Report to the Honorable Donald J. Pease, House of Representatives, by the General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* (1984) (*reprinted in* the *1985 Hearing* 37).

A. *Mandamus Relief Is Unavailable Because Members Of The Putative Class Were Owed No Clear Nondiscretionary Duty And Failed To Exhaust Their Statutory Remedies*

1. "This Court repeatedly has observed that mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, No. 86-1329 (Mar. 22, 1988), slip op. 17-18, citing *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). As codified at 28 U.S.C. 1361,[23] mandamus is warranted "only if the defendant owes [the plaintiff] a clear nondiscretionary duty." *Heckler* v. *Ringer,* 466 U.S. 602, 616 (1984). See also *Gulfstream Aerospace*, slip op. 18; *Kerr*, 426 U.S. at 403. The Secretary of Labor did not breach any clear nondiscretionary duty owed to members of the putative class.

The Department of Labor followed the directive of Section 402(f)(2) and considered (in some cases, reconsidered), under its interim regulation, claims filed before the final regulations were promulgated. The Eighth Circuit found a breach of a clear duty because it concluded that the interim regulation conflicted with the statute. But, even assuming that the interim regulation is inconsistent

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[23] Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

with Section 402(f)(2), mandamus is not warranted because where the existence of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206, 219 (1930). Otherwise stated, "the mandamus remedy is only available 'under *exceptional* circumstances of *clear illegality*. When the performance of official duty calls for a construction of governing law, the [federal] officer's interpretation will not be disturbed by a writ of mandamus unless it is *clearly wrong* and his official action is arbitrary and capricious.' " *Homewood Professional Care Center, Ltd.* v. *Heckler,* 764 F.2d 1242, 1251 (7th Cir. 1985) (emphasis in original) (quoting *Americana Healthcare Corp.* v. *Schweiker,* 688 F.2d 1072, 1084 (7th Cir. 1982), cert. denied, 459 U.S. 1202 (1983)). See also *Maczko* v. *Joyce,* 814 F.2d 308, 310 (6th Cir. 1987) ("when a duty is disputed or subject to various interpretations * * * the duty is not 'owed' in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial"), cert. denied, No. 86-2020 (Oct. 5, 1987). In light of the conflict in the circuits on the merits issue (and the dissenting opinions in two of the cases where the courts held that the Secretary's interim regulation conflicts with the statute), it can hardly be argued that the Secretary's construction is so clearly wrong as to warrant mandamus.

Respondents attempt to avoid the "clear illegality" requirement by suggesting that it no longer applies when a court of appeals must construe a statute to decide whether a clear legal duty exists.[24] Under their theory, a court may

[24] The putative class respondents dismiss decisions such as this Court's decision in *Wilbur* as "old cases." 87-821 Br. in Opp. 21.

construe a statute the interpretation of which is in doubt and, if it concludes that the statute, as construed, creates a duty, then such a duty clearly exists. See, *e.g., Government of Virgin Islands* v. *Douglas,* 812 F.2d 822, 832 n.10 (3d Cir. 1987); *13th Regional Corp.* v. *United States Dep't of Interior,* 654 F.2d 758, 760 (D.C. Cir. 1980). We submit that mandamus cannot be so justified. Even if it could, however, such a theory would not be applicable here because nothing in the statute compels the Secretary to reopen their claims now. To support the action it took, the Eighth Circuit not only had to conclude (wrongly in our view) that the statute plainly means what respondents say it means, but also that the statute plainly requires the Secretary to reopen (and, in some cases, re-reopen) claims that had been finally denied. The statute directed the Secretary to reopen some claims, and they were reopened. Nothing in the statute requires the Secretary to reopen those claims again, or to reopen the other claims that were first denied under Labor's interim regulation, and the Secretary accordingly has no duty, much less a clear nondiscretionary duty, to do so.

2. In addition, mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief." *Heckler* v. *Ringer,* 466 U.S. at 616. Mandamus is plainly unwarranted here because members of the putative class failed to exhaust the statutory remedies that were open to them and, if pursued, might have provided the relief they seek.

The Black Lung Benefits Act, which incorporates adjudicatory provisions of the Longshore and Harbor Workers' Compensation Act (see 30 U.S.C. (& Supp. III) 932(a)), provides a comprehensive review scheme that allows a claimant a full opportunity to contest the validity of regulations such as the interim presumption at issue here. Claims for benefits are presented to a deputy com-

missioner in the Department of Labor's Office of Workers' Compensation Programs, who is responsible for developing evidence, notifying responsible coal mine operators of potential liability, defining contested issues, and making an initial determination on eligibility. See 20 C.F.R. 725.351(a), 725.410-725.422. Any party who disagrees with the deputy commissioner's proposed resolution of the issues may obtain a hearing before an administrative law judge (ALJ) by requesting one within 30 days of the deputy's decision. 20 C.F.R. 725.419. After the ALJ rules, any party may seek review of that decision by the Benefits Review Board (20 C.F.R. 725.481), which "fulfill[s] the review function previously performed by district courts" (*Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985)), by filing a petition for review within 30 days of the ALJ's decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(a)); 20 C.F.R. 725.479. The Board has asserted, with court approval, that it has authority to invalidate regulations that it finds inconsistent with the Black Lung Benefits Act. *Gibas*; *Carozza* v. *United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *McCluskey* v. *Zeigler Coal Co.*, 2 B.L.R. 1-1248 (Ben. Rev. Bd. 1981).[25]

[25] In fact, whether Labor's interim regulation complies with Section 402(f)(2) was first raised, sua sponte, by Board member Miller, in *Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 B.L.R. 1-125, 1-128 (1981). The Board did not decide the issue in *Lynn* (*id.* at 1-126 n.1) or in *Halon* (see 713 F.2d at 31), the first court of appeals decision on the issue, because it had not been timely raised in either case. After *Halon*, the Board found the regulation consistent with the statute, but followed *Halon* in claims arising in the Third Circuit. See *Reilly* v. *Director, Office of Workers' Compensation Programs*, 7 B.L.R. 1-139, 1-144 (1984). Because the issue was unsettled before the Board until 1984, and because adminstrative law judges follow the Board where it disagrees with Labor Department regulations, respondents err in claiming (87-821 Br. in Opp. 16) that raising the issue would have forced members of the putative class, all of whom filed claims before April 1, 1980, through a "clearly futile pursuit of the entire administrative process and an appeal to a court of appeals."

Any party may petition the appropriate court of appeals for review of the Board's decison for legal error within 60 days. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(c)); 20 C.F.R. 725.482.

The members of the putative class have in common a failure to timely pursue the remedies statutorily available to them to challenge the denial of their claims. Some failed to challenge adverse decisions by a deputy commissioner, others failed to seek review of an adverse ALJ decision, and others failed to appeal adverse Benefits Review Board decisions to the court of appeals. See 87-827 Pet. App. 4a-5a. There is no question that the relief they now seek could have been ordered, had they pursued their claims. The claimants in *Halon, Coughlan, Kyle,* and *Broyles* obtained that relief, and the putative class respondents have suggested no reason why they failed to pursue their claims. Accordingly, there is no reason why the requirement for mandamus relief that a plaintiff "exhaust[] all other avenues of relief" (*Heckler* v. *Ringer,* 466 U.S. at 616) should be waived.[26]

There are substantial practical reasons for requiring exhaustion of the statutory remedies. See generally *McKart*

[26] The putative class respondents state (87-821 Br. in Opp. 19) that "the Secretary had denied claimants a right that could not, in principle, be vindicated if those claimants were required to pursue the administrative process on an individual basis." That is flatly wrong. If they had appealed and prevailed on the argument that the Secretary's interim regulation is contrary to Section 402(f)(2), and they qualified for the presumption of entitlement under HEW's interim regulation, they would have obtained the benefit of that presumption, which is

v. *United States*, 395 U.S. 185, 193-195 (1969). If putative class members had challenged Labor's construction of Section 402(f)(2) in a timely manner, the agency could have addressed it in individual cases and at least identified those cases where the interpretation of Section 402(f)(2) made a difference in the outcome. As matters now stand, it is not possible to determine which claimants might have been adversely affected by Labor's construction. Moreover, the Eighth Circuit's decision eviscerates the deadlines established for appealing denials of black lung benefits claims, which have been held to be jurisdictional. See, *e.g.*, *Bolling* v. *Director, Office of Workers' Compensation Programs*, 823 F.2d 165 (6th Cir. 1987); *Butcher* v. *Big Mountain Coal, Inc.*, 802 F.2d 1506 (4th Cir. 1986); and cases cited at 87-827 Pet. App. 17a n.13. Indeed, the court of appeals acknowledged that, in its view, those deadlines were "largely unmeaningful" (*id.* at 17a).

B. ***Reconsideration Of The Claims Is Barred By Res Judicata***

In addition to being barred from seeking mandamus relief because they failed to pursue the avenue of relief available to them under the Black Lung Benefits Act, the

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what they now seek. The cases respondents cite in support of their claim that exhaustion should be excused, such as *Nader* v. *Volpe*, 466 F.2d 261, 269 (D.C. Cir. 1972) (district court may "preserve a substantial right from irretrievable subversion in an administrative proceeding"), are therefore not relevant to their claim. Moreover, as the Eighth Circuit noted (87-827 Pet. App. 4a), Labor has been applying adverse court of appeals decisions in cases pending in the relevant circuit on the date of the decision, so, after the first claimant in a circuit prevailed on the merits issue, no other claimant was required to continue to pursue it. And, in light of respondents' suggestion that it is unreasonable to expect claimants to retain counsel (87-821 Br. in Opp. 17), it should be noted that the Act requires responsible operators or the Black Lung Disability Trust Fund to pay prevailing claimants' attorneys' fees. See 20 C.F.R. 725.362, 725.367.

putative class members are barred from attempting to relitigate their claims now by res judicata, because they failed to challenge the denials of their claims within the time limits Congress established. It is well settled that a final judgment of a court on the merits of an action "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Relitigation is barred even if the final, unappealed judgment was "wrong or rested on a legal principle subsequently overruled in another case" (*ibid.*). Similarly, under Section 83 of the Restatement (Second) of Judgments (1982), "a valid and final [administrative] adjudicative determination has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

This Court has held that the unreviewed factfindings of state and federal administrative agencies are entitled to preclusive effect. *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), slip op. 10; *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966). The Court has also stated more broadly that res judicata would bar the relitigation of a "claim" that was the subject of an administrative determination. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948). Although this Court has not held that an unreviewed administrative judgment bars a party from litigating a legal issue that could have been raised but was not in the administrative action or on appeal (see 4 K. Davis, *Administrative Law Treatise* 49 (1983)), it has recognized the principle set forth in the Restatement of Judgments that the preclusive effect of an administrative decision is largely determined by whether the administrative forum has " 'the essential procedural characteristics of a court.' " *University of Tennessee*, slip op. 9 n.6 (quoting comments to Section 83 of the Restatement (Second) of Judgments).

The Restatement rule that parties are precluded from bringing actions raising legal issues that they could have raised in a prior administrative proceeding where the administrative proceeding had the essential characteristics of a judicial proceeding should be applied here. It is clear that black lung benefits claims are adjudicated in adversarial, court-like proceedings. Claimants (and operators) have the right to counsel (20 C.F.R. 725.362), may develop evidence and engage in discovery (20 C.F.R. 725.450-725.457), and receive written decisions with findings of fact and conclusions of law (20 C.F.R. 725.418(b), 725.477(b)). Review by the Benefits Review Board and then by a court of appeals is available after an ALJ decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921)). As noted (page 32, *supra*), the Board considers itself free to hold that Labor Department regulations conflict with the statute and, of course, a court of appeals has authority to reverse a benefit decision on the basis that the standards applied in the administrative proceeding were contrary to those required by the statute. If a party fails to seek timely review of a decision by a deputy commissioner, an administrative law judge, or the Benefits Review Board, the unreviewed decision becomes final.[27]

[27] Decisions are subject to modification only where there is "a change in conditions or a mistake in a determination of fact" and a request for modification is made within one year of the final decision. See 30 U.S.C. (& Supp. III) 932(a); 33 U.S.C. (& Supp. III) 922; 20 C.F.R. 725.310. This modification provision is not a basis for refusing to apply res judicata any more than the possibility of reopening district court judgments for various reasons under Fed. R. Civ. P. 60(b) is a reason for refusing to give judicial decisions preclusive effect. See *Downs* v. *Director, Office of Workers' Compensation Programs*, 803 F.2d 193, 199 n.13 (5th Cir. 1986) (res judicata applies despite modification possibilities).

Barring the putative class members from reviving their claims also makes sense. Res judicata " 'is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts.' " *Federated Department Stores,* 452 U.S. at 401 (citations omitted). Res judicata establishes "certainty in legal relations" (*Sunnen,* 333 U.S. at 597). There is no repose if courts are able to order the reopening of closed cases any time they believe an administrative adjudicator has misconstrued a directive in the governing statute.[28]

Subsequent claims for black lung benefits may be entertained where "the deputy commissioner determines that there has been a material change in conditions." 20 C.F.R. 725.309(d). That exception is necessary because pneumoconiosis is a progressive disease, so that a claimant who is not totally disabled when he first applies for benefits may subsequently become totally disabled as a result of black lung disease even if he was not exposed to coal dust in the interim. See Lopatto, *supra,* 85 W. Va. L. Rev. at 680. That exception is plainly not a valid basis for denying preclusive effect to administrative decisions in situations where the predicate for reconsideration—a material change in conditions—is not satisfied.

[28] The Eighth Circuit suggested that Congress intended to waive the failure on the part of the members of the putative class to exhaust their administrative remedies or seek judicial review in timely fashion (87-827 Pet. App. 15a-17a). But, while Congress did in fact waive the deadlines in the case of claimants who had been denied benefits prior to the 1978 amendments by ordering that their claims be reopened, those claims were reopened and reconsidered. The court of appeals plainly erred in concluding that it could order further reopening. Nothing in the statute suggests that Congress intended to abolish the deadlines it had established, so that claims are permanently subject to reopening by the courts.

In addition, the interests res judicata serves in "avoiding the cost and vexation of repetitive litigation" (*University of Tennessee,* slip op. 9) especially support its application here. The costs of reopening thousands of claims would be significant. Since the claims of putative class members were denied at least three years ago, and many of them long before that, it would be difficult to retrieve their files and locate members of the putative class. In addition, members of Congress and the Department of Labor viewed the backlog in adjudicating black lung benefits claims as unacceptable when pending claims numbered about 21,000 before administrative law judges and 5,687 before the Benefits Review Board. *1985 Hearing, 10 (statement of Sen. Rockefeller); 34 (statement of Rep. Rahall); 126-127 (Statement of Nahum Litt, Chief of the Department of Labor's Office of Administrative Law Judges). The result of this backlog was a delay of three and one-half to seven years for claimants to receive decisions on their claims (id.* at 10 (statement of Sen. Rockefeller)). It takes little imagination to perceive the drastic impact of the Eighth Circuit's decision, which could require the reexamination of 94,000 claims. Cf. *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 636-637 (1983) (interpreting Longshore and Harbor Workers' Compensation Act to permit significant increase in number of the challenges in administrative process would undermine the statutory goal of providing prompt compensation to injured workers and their survivors.[29]

[29] It would also be difficult for individual coal mine operators or the industry-financed Black Lung Disability Trust Fund, which at the end of February 1988 was over $2.9 billion in debt to the United States Treasury, to gather evidence to meet these stale claims. The individual operators and their insurers could not reasonably have anticipated

The putative class members are not situated differently from the respondents in *Federated Department Stores* in any significant manner. In that case, several parties filed actions in federal district court, which were all dismissed. Some of the parties appealed, while others did not. While the appealed cases were pending, an intervening decision made clear that the district court had erroneously dismissed the actions and the appealed cases were accordingly remanded. The nonappealing parties then refiled essentially identical actions in order to obtain the benefit of the intervening decision, but this Court held that res judicata barred their claims. The putative class members, like the respondents in *Federated Department Stores,* failed to appeal earlier adjudications and this suit is their attempt to obtain the benefit of the favorable intervening decisions of the courts of appeals other than the Seventh Circuit. Like the nonappealing parties in *Federated Department Stores,* their attempt should be barred by res judicata.[30]

that thousands of previously-denied claims would be ordered reopened. Nor could Congress, in setting the rate of tax on coal to finance the debt-ridden trust fund (26 U.S.C. 4121(a), 9501), have anticipated the Eighth Circuit's decision.

[30] The Eighth Circuit cited (87-827 Pet. App. 16a) *Bowen* v. *City of New York*, 476 U.S. 467 (1986), in support of its conclusion that reopening is not barred because the claims had been finally denied. That case does not support the Eighth Circuit's decision to order reopening. First, the time limits under the Black Lung Benefits Act have been construed to be jurisdictional and do not allow for extensions of time as does the provision of the Social Security Act (42 U.S.C. 405(g)) at issue in *Bowen* v. *City of New York*. See 33 U.S.C. 921(c) (incorporated by 30 U.S.C. (& Supp. III) 932(a)). Second, this Court's reasoning in that case supports the conclusion that reopening is *not* appropriate here. The Court recognized that "exhaustion is the rule in the vast majority of cases" (*id.* at 486). It concluded that tolling of statutes of limitations is warranted "in the rare case such as this" (476 U.S. at 481) where an "unrevealed policy" was implemented (*id.* at 485). There was, of course, no secret policy here; the Secretary's interim regulations have been published in the Code of Federal Regulations since they were promulgated in 1978.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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MAY 1988

APPENDIX

A. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that –
>
> (A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;
>
> (B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;
>
> (C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of title 42; and
>
> (D) the Secretary of Labor, in consultation with the Director of the National Institute for

Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of –

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

B. HEW's interim regulation, 20 C.F.R. 410.490, provides:

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

C. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412 (a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

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RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-821 and 87-827

PITTSTON COAL GROUP, *et al.*,
Petitioners,

v.

JAMES SEBBEN, *et al.*,
Respondents.

ANN MCLAUGHLIN, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

JAMES SEBBEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

This case involves the rights of those former coal miners who (1) filed for benefits under the Black Lung Benefits Act on or before March 31, 1980, and (2) worked in coal mines for less than ten years. Under regulations promulgated by the Secretary of Labor ("the Secretary"), the fact that these claimants lacked ten years of mine exposure meant that they could not invoke the "interim presumption" of disability contained in 20 C.F.R. § 727.203. Instead, they were required to prove their eligibility under the far more onerous "permanent" standards. *See* 20 C.F.R. §§ 410.401-.476.[1]

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[1] *See* note 23 *infra*.

Respondents contend that the denial of the benefit of the interim presumption to this group of claimants was inconsistent with the plain terms of the Black Lung Benefits Reform Act of 1977 ("the 1977 Amendments"), codified in 30 U.S.C. § 902(f)(2).

This basic claim arises in different ways in the two cases consolidated here. No. 87-1095, *Director, Office of Workers' Compensation Programs v. Broyles*, involves two miners who pursued administrative and judicial appeals from the initial denials of their claims, and won a ruling below directing the Secretary to apply the interim presumption in their cases. The instant case, by contrast, involves a proposed class of miners whose individual claims are not still pending. They seek to enforce a separate statutory right also created by the 1977 Amendments—the right to have the files of all pending or denied claims reviewed by the Secretary under revised criteria incorporating the interim presumption of disability. *See* 30 U.S.C. § 945(b).[2] Although the Secretary went through the motions of conducting such reviews, those reviews were largely meaningless for the class of claimants who lacked ten years of mine exposure and thus were categorically excluded from the scope of the interim presumption. These claimants thus never received the key benefit mandated by Congress in section 945(b). Moreover, as we demonstrate here, their right to enforce this mandate was not forfeited when they failed to pursue administrative appeals by which they might ultimately have obtained benefits.

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[2] The class, as proposed and approved below, also included claimants who filed for benefits after the effective date of the 1977 Amendments and prior to April 1, 1980, when the Secretary's obligation to apply the interim presumption to new claims lapsed by virtue of the final promulgation of new permanent standards. *See* U.S. Pet. App. 18a. *See also* 30 U.S.C. § 902(f)(2)(C). As discussed in note 85 *infra*, this "subclass" was not covered by the automatic review process mandated in section 945(b).

The Black Lung Benefits Act provides benefits to former coal miners who are "totally disabled" due to "pneumoconiosis."[3] "Pneumoconiosis," in turn, includes the condition that is commonly known as "black lung,"[4] as well as other respiratory impairments "arising out of coal mine employment."[5] *See Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 431 (1987). As described in petitioners' briefs, the federal benefits program, created in 1969, has two parts. Part B, administered by the Secretary of Health, Education and Welfare through the Social Security Administration (SSA), provided benefits to claimants who filed prior to the end of June 1973.[6] Part C, administered by the Secretary of Labor, applies to subsequent claims. Depending on the circumstances, Part C benefits are paid either by the federal Black Lung Disability Trust Fund or by individual coal-mine operators. For the large majority of claims at issue here, the federal fund would be responsible to pay any benefits.[7]

The events leading up to the present controversy began in 1972, when Congress recognized that many Part B

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[3] 30 U.S.C. § 921(a); 20 C.F.R. § 718.1.

[4] "Pneumoconiosis" as a medical term refers to the formation of nodular lesions caused by inhalation of many different types of dust. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 n.2 (1976). The statutory use of the term is both broader (because it includes other types of respiratory conditions) and narrower (because it applies only to conditions arising out of coal-mine employment).

[5] 30 U.S.C. § 902(b).

[6] The original deadline had been December 31, 1972, but it was extended in 1972. Congress also enacted special transitional provisions covering claims filed in the second half of 1973. *See* 30 U.S.C. § 925.

[7] The fund is responsible for all claims (1) where the last mine employment was prior to January 1, 1970, (2) where the claims were denied prior to the 1977 Amendments but were granted after review under those Amendments, or (3) where a responsible mine operator cannot be found. 30 U.S.C. § 932(j).

claims were being inappropriately denied and responded by thoroughly amending the Act.[8] Among other things, it called for more generous eligibility standards and reconsideration of previously denied claims.[9] The Secretary of HEW responded to the 1972 Amendments by promulgating the so-called "interim presumption" regulation—20 C.F.R. § 410.490. *See Mullins*, 108 S. Ct. at 436-37.

This regulation created a rebuttable presumption that a claimant was "totally disabled due to pneumoconiosis" —and thus eligible for benefits—based on the submission of certain specified types of evidence. To trigger the interim presumption, a claimant either had to prove the existence of "simple pneumoconiosis" [10] directly—through x-rays, a biopsy or (in the case of a survivor's claim) an autopsy—or, if he had fifteen years of coal mine employment, could rely on ventilatory studies showing specified levels of breathing impairment. 20 C.F.R. § 410.490 (b)(1)(i), (ii). In addition, the claimant had to demonstrate that his impairment arose out of coal mine employment. *Id.* § 410.490(b)(2). To accomplish this, a claimant could rely on a separate presumption of causation, based in the statute,[11] triggered by a showing of pneumoconiosis plus ten years of mine employment.[12] But a claimant with less than ten years of mine exposure was not foreclosed: he could offer direct evidence that his pneumoconiosis arose out of mine employment. *See id.* (incorporating §§ 410.416(b) and 410.456(b)). Once

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[8] *See* Pub. L. No. 92-303, 86 Stat. 153 (1972).

[9] *See* 30 U.S.C. § 941 (Supp. 1972).

[10] Physicians refer to two levels of pneumoconiosis: simple pneumoconiosis, which may or may not be disabling on its own, and complicated pneumoconiosis, which generally is disabling. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

[11] *See* 30 U.S.C. § 921(c)(1).

[12] Section 410.490(b)(2) incorporated sections 410.416 and 410.456, each of which authorized a presumption of causation based on ten years of exposure. *See also* 20 C.F.R. § 410.490(b)(3).

the interim presumption was properly invoked, it could be rebutted by a showing that the claimant was not, in fact, disabled. *Id.* § 410.490(c). *See generally Mullins*, 108 S. Ct. at 437.

The first interim presumption regulation, however, was expressly limited to Part B claims. 20 C.F.R. § 410.490 (b). The Secretary of Health, Education and Welfare simultaneously promulgated new "permanent" regulations governing the adjudications of Part C claims by the Department of Labor that began in 1973. *See id.* §§ 410.401-.476. The key feature of these regulations was the requirement that all claimants *prove* not only that they had pneumoconiosis caused by coal mining but also that they were totally disabled.[13]

The results of the 1972 regulatory changes were therefore predictable. As the Part B "claims approval rate increased, Labor's remained low, in large part because of the absence of an interim presumption." *Mullins*, 108 S. Ct. at 437.[14] At the same time, the Department of Labor built up a huge backlog of claims that were still awaiting

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[13] *See* 20 C.F.R. §§ 410.410, .412, .422-.426.

[14] *See also* Solomons, "A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues," 83 W. Va. L. Rev. 869, 873 (1981) ("The inapplicability of the interim presumption to Department of Labor claims was, at a very early date, recognized as perhaps the most significant factor accounting for this approval rate disparity.") (footnotes omitted). While the SSA approval rate reached 70 percent by 1976, the Labor approval rate was less than 10 percent. Speech by Robert D. McGillicuddy, Assistant to the Staff Director of the House Subcomm. on Labor Standards, before the Legal Staff of the Benefits Review Board (September 26, 1978), *reprinted in* House Comm. on Education and Labor, 96th Cong., 2d Sess., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, at 1236 (Comm. Print 1979) (hereinafter "House Committee Print"). *See also* Solomons, *supra*, at 873 n.14; Lopatto, "The Federal Black Lung Program: A 1983 Primer," 85 W. Va. L. Rev. 677, 691 (1983).

any determination at all.[15] This state of affairs led to a series of legislative proposals requiring the application of the SSA interim presumption regulation to all Part C claims.[16] By 1977, these proposals led to the passage in the House of a bill that would have required the Secretary of Labor to promulgate regulations containing "criteria" for determining "total disability" that were "not . . . more restrictive" than those applied to Part B claims.[17] The Senate, although equally cognizant of the flaws in the existing Part C regulations, pursued a different path—amending the House bill so that it would have required the Secretary to establish new criteria "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." [18]

In the version of the bill ultimately developed by a conference committee and passed by both houses, these two solutions were combined. The House proposal re-

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[15] By 1978, the Secretary had received well over 100,000 Part C claims, but only about half had received any initial determination. Lopatto, *supra* note 14, at 691; McGillicuddy, *supra* note 14, at 1236.

[16] *See, e.g.*, H.R. 2913, 94th Cong., 1st Sess. § 3 (1975), *reprinted in* House Committee Print, *supra* note 14, at 49-50 ("The standards for determining whether a minor who filed a claim after July 1, 1973, is totally disabled due to pneumoconiosis shall not be more restrictive than the standards prescribed by the Secretary for evaluating claims filed prior to July 1, 1973."); H.R. 10760, 94th Cong., 1st Sess. § 7(a) (1975), *reprinted in* House Committee Print, *supra* note 14, at 83 ("With respect to a claim filed after June 30, 1973, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973.") These proposals originated in 1974 with the legislative office of the United Mine Workers. *See* Black Lung Amendments of 1973: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st & 2d Sess. 349 (1974) (hereinafter "1973-74 House Hearings").

[17] H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977), *reprinted in* 123 Cong. Rec. 29828 (1977).

[18] *See* 123 Cong. Rec. 29924 (1977); S. Rep. No. 209, 95th Cong., 1st Sess. 28, 35 (1977).

quiring criteria "not . . . more restrictive" than SSA's was accepted, but was limited to all claims filed prior to the final promulgation of new permanent standards that would govern all later claims.[19] Thus, Congress mandated a second, time-limited "interim" standard. In addition, the final bill created a mechanism for dealing with the large number of Part C claims that had either been denied under the old permanent regulations or were part of the backlog of claims awaiting some determination. That mechanism was a requirement that the Secretary "review each claim" that had been denied or was pending as of the effective date of the new statute, "taking into account the amendment made to this part by the Black Lung Benefits Reform Act of 1977," and "approve any such claim forthwith" if the new standards required such approval. 30 U.S.C. § 945(b)(1).[20] These reviews were also to be governed by criteria "not . . . more restrictive" than those used by SSA under Part B. *See* 30 U.S.C. § 902(f)(2)(A), (B).

In response to the 1977 Amendments, the Secretary promulgated a new interim presumption regulation applicable to all pending or previously denied claims, as well as all claims filed prior to the final promulgation of new permanent standards. *See* 20 C.F.R. § 727.203. This regulation was in effect until March 31, 1980, when new permanent standards were put in place. *See id.* § 718.2. The Secretary also provided by regulation for expedited review of all pending or denied claims to determine whether they would qualify under the revised standards. *See id.* § 727.108. Those reviews went forward and, largely by virtue of the application of the interim pre-

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[19] *See* 30 U.S.C. § 902(f)(2); H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978), *reprinted in* House Committee Print, *supra* note 14, at 887 (hereinafter "House Conference Report").

[20] The Secretary was further instructed not to require submission of any further evidence "if the evidence on file is sufficient for approval of the claim," *id.* § 945(b)(2)(A), and was told to award benefits retroactively, *id.* § 945(c).

sumption, the rate of claims approval by the Department of Labor changed dramatically. Prior to the 1977 Amendments, less than 10 percent of Part C claims were being approved. *See* note 14 *supra*. After completion of the reviews, 45 percent of the Part C claims subject to review had been approved.[21]

The problem that led to this litigation was the fact that one category of Part C claimants—those with less than ten years' experience in coal mines—could not benefit from these changed standards because they were categorically excluded from application of the new interim presumption. The new regulation treated miners with more than ten years' experience essentially the same as they were treated under the old SSA rule: they submitted specified types of medical evidence, along with proof of ten years of mine employment, and were thereafter rebuttably presumed to be totally disabled due to pneumoconiosis arising out of that mine employment.[22] However, the regulation expressly barred invocation by miners who had not "engaged in coal mine employment for at least 10 years." 20 C.F.R. § 727.203(a). Even if, for example, they submitted direct x-ray evidence of pneumoconiosis and affirmative evidence linking that disease to work in coal mines, their claims were reviewed or adjudicated under the same "permanent" standards that Congress had rejected.[23] These claimants were therefore denied the key benefit that Congress sought to bestow—the ability to shift the burden of proof on the issue of disability by offering evidence of pneumoconiosis arising out of coal mine employment.[24]

The miners who had their pending or denied claims reviewed by the Secretary, but were denied the benefit of the interim presumption because they lacked ten years of exposure, received summary notices from claims examiners indicating that the evidence in their files did not qualify even under the revised standards of the 1977 Amendments. They were told that they had only one option—to attempt to supply additional evidence *proving* their disability either to the claims examiner, *see* 20 C.F.R. § 727.108(d)(1), or at a full hearing before an administrative law judge, *see id.* § 727.109.[25]

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[21] There were 125,229 Part C claims pending or denied as of the effective date of the 1977 Amendments. Of these, 56,957 had been approved when reviews were completed in 1980. Secretary of Labor, Annual Report to Congress on the Black Lung Program 4 (1980).

[22] Indeed, the new rule broadened the types of medical evidence that could be used to trigger this presumption. *See* 20 C.F.R. § 727.203(a)(3)-.203(a)(5).

[23] *See* 20 C.F.R. §§ 727.4(b), .203(d). The new permanent regulations, set out in 20 C.F.R. Part 718, did not take effect until March 31, 1980, after many of the reviews had already been completed. Even thereafter, the Benefits Review Board continued to take the position that claims filed prior to March 31, 1980, and excluded from the Labor interim rule, should be adjudicated under the old permanent standards. *See Muncy v. Wolfe Creek Collieries Coal Co.*, 3 Black Lung Rep. 1-627 (Ben. Rev. Bd. 1981). *But see Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 406 n.9 (7th Cir. 1987). In any event, the new permanent standards, like the old ones, contained no presumption of disability comparable to the interim presumption.

[24] The regulations suggest that these claimants may have received some tangential benefits as a result of the 1977 Amendments, because the old permanent standards were applied in such a way as to reflect *other* changes made by those Amendments. *See* 20 C.F.R. § 727.4(b). But these other changes were largely meaningless for those claimants who could show pneumoconiosis arising out of coal mine employment but were barred from using the interim presumption because they lacked ten years of mine employment. Thus, for example, the Amendments prohibited the Secretary, under certain circumstances, from "re-reading" x-rays that had been interpreted by a qualified radiologist as showing pneumoconiosis. 30 U.S.C. § 923(b). This issue, however, could hardly help the claimants at issue here, who lacked the right to invoke a presumption of disability based on such x-rays. Similarly, the Amendments broadened the definition of "pneumoconiosis." *id.* § 902(b), but these claimants, by hypothesis, could show pneumoconiosis under the old narrower definition.

[25] Claimants were given 30 days in which to indicate that they would supply additional evidence. Coal Mine (BLBA) Procedure

Unsurprisingly, most such claimants failed to pursue their claims further. Many had previously had their same claims denied under the same non-presumptive disability standards that they were still being asked to satisfy. Others had already waited years for any determination. Moreover, since very few were represented by counsel, they had no realistic way of knowing that, after undergoing the ALJ hearing process, they might be able to mount a statutory challenge to the standards being applied by the Secretary before the Benefits Review Board or in a court of appeals.

Nevertheless, the Secretary's version of the interim presumption did not go totally unchallenged. To date, four courts of appeals have held that the Secretary had deviated from the statutory mandate of promulgating criteria "not . . . more restrictive" than those previously applied under Part B. *See Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983); *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985); *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir.), *petition for cert. filed*, No. 87-1045 (1987); *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987), *cert. granted*, No. 87-1095 (1988). The only dissent from this line of authority was the Seventh Circuit's ruling in *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987).

The instant case arose after the Eighth Circuit's ruling in *Coughlan*. The Department of Labor had taken the position that it would apply the *Coughlan* ruling only in pending cases. Respondents, four former Iowa coal miners who had been denied benefits during the 1970s, filed suit seeking designation as representatives of the

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Manual ch. 2-1600, ¶ 22. There was a 60-day deadline for requesting an ALJ hearing after a claim was finally denied. 20 C.F.R. § 725.410(c).

class of claimants who (1) were denied the benefit of the interim presumption by virtue of the exclusion of claimants lacking ten years' exposure in 20 C.F.R. § 727.203, and (2) did not have claims that remained active in the administrative process. Jurisdiction was predicated on 28 U.S.C. § 1361, the general mandamus statute. Respondents sought an order directing the Secretary to comply with 30 U.S.C. § 945(b) by reviewing the file of each such claimant and applying the standards mandated by the 1977 Amendments.

The defendants moved to dismiss the case for want of jurisdiction, arguing that the existence of an administrative review process for black lung claims—culminating in court of appeals review of decisions of the Benefits Review Board—precludes district court jurisdiction over the instant case. The plaintiffs responded that their claim of a right to appropriate Secretarial reviews of their files could only be vindicated through this mandamus action, and that jurisdiction was therefore not precluded.

The district court granted the motion to dismiss. U.S. Pet. App. 19a-22a. It held that respondents had not made the showing required for recognition of an exception to the statutory review process. In so doing, it acknowledged the possibility of non-statutory review in cases where statutory appeal mechanisms cannot vindicate the right at issue, but suggested that it would be more appropriate to bring such a case directly in a court of appeals under the All Writs Act, 28 U.S.C. § 1651. U.S. Pet. App. 21a.

A unanimous panel of the Eighth Circuit reversed. It acknowledged that statutory review procedures are "generally the exclusive means of review," and that there is a presumption against the availability of "simultaneous review of administrative actions in both the district court and the circuit court of appeals." U.S. Pet. App. 3a-4a. But it held that there is a " 'residuum' " of jurisdiction in the district courts to enforce the Black Lung Benefits Act in a case of a " 'patent violation of agency authority

or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review.'" U.S. Pet. App. 4a (quoting *Louisville & Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), and *Nader v. Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972)). That jurisdiction, it held, may be predicated on section 1361, the mandamus statute. *Id.*

The court went on to conclude that, under the 1977 Amendments, the Secretary had a "clear nondiscretionary duty" to reopen and review all pending and denied Part C claims under the standards mandated by that statute. *Id.* at 12a. This duty, it held, was not fulfilled because claimants lacking ten years of mine exposure were excluded from coverage by the new standards that the Secretary had promulgated in conformance with the 1977 Amendments.[26] *Id.* The court then concluded that enforcement of this clear duty through mandamus was not foreclosed either by the usual requirement of exhaustion of administrative remedies or by the limitations periods applicable in the administrative process. *Id.* at 13a-18a. It drew a distinction between the specific right at issue here—the right to have existing claims reviewed *sua sponte* under the new criteria mandated by the 1977 Amendments—and the general right of eligible claimants to receive benefits. *Id.* at 13a. A mandamus action is appropriate here, in the court's view, because the administrative remedies provided by statute address only the latter issue and could not, in principle, vindicate claimants' right to an automatic review. It follows that neither the existence of an administrative review process, nor the time limits governing that process, prevent respondents from pursuing their claim in district court.

[26] The Eighth Circuit also found a violation of a clear duty with respect to those claims that were filed after the effective date of the 1977 Amendments and prior to April 1, 1980—all of which were also statutorily required to be adjudicated under criteria "not . . . more restrictive" than those used under Part B, 30 U.S.C. § 902(f)(2)(C). *See* U.S. Pet. App. 12a.

The Eighth Circuit remanded the case with instructions to certify an appropriate class and award class members the limited relief of new, valid Secretarial reviews of their claim files, applying criteria satisfying the statutory mandate. Requests for rehearing *en banc* by both the Secretary and various private intervenors were denied.

SUMMARY OF ARGUMENT

The interim rule adopted by the Secretary, 20 C.F.R. § 727.203, by excluding claimants who lack ten years of mine employment, contravened the statutory requirement of criteria "not . . . more restrictive" than those previously used under Part B. *See* 30 U.S.C. § 902(f)(2). These claimants could submit direct evidence of pneumoconiosis arising out of coal-mine employment, but, unlike under Part B, this evidence would not trigger a presumption of disability. Instead, these claims were still adjudicated, or reviewed under 30 U.S.C. § 945, using the old Part C permanent standards, 20 C.F.R. §§ 410.401-.476, which Congress had rejected as unfair and which required affirmative proof of "total disability."

Petitioners attempt to defend this outcome on the theory that (1) the statutory "not . . . more restrictive" requirement applies only to *disability* criteria, and (2) the exclusion of claimants with less than ten years of mine employment relates to the separate eligibility issue of "causation" by coal-mine employment. Each of these propositions is demonstrably false. First, there is no basis for asserting that the Secretary was left the discretion to create any new eligibility criteria more restrictive than SSA's, regardless of which eligibility issue they were intended to address. Any such new criterion, after all, would interfere with the achievement of the central statutory objective, which was to assure application of the interim presumption of disability to all Part C claimants. Moreover, the statute and its legislative history do not support any limitation of the "not . . . more restrictive" requirement to disability criteria alone.

Second, the exclusion at issue here cannot in any event be viewed as a "causation-related" criterion. In fact, its sole effect was to determine whether claims would be assessed under the new interim standards or under the old permanent standards—*i.e.*, to determine the burden of proof on the issue of *disability*. Moreover, when the Department promulgated the new interim rule, it also proposed new permanent standards, applicable to later claims, that expressly contemplated that claimants lacking ten years of mine employment could prove that their pneumoconiosis was caused by that employment. 20 C.F.R. § 718.203. This fact makes it clear that the Secretary never made a general determination that pneumoconiosis shown by such claimants could not be causally related to coal mining. In any event, such a determination, on its face, would make no sense, since years of coal mining (although less than ten) can certainly be at least a *contributing* cause of pneumoconiosis.

Petitioners attempt to sustain their argument by asserting that respondents' claim would lead to the invalidation of some of the rebuttal criteria in section 727.203 (b) and thereby would undermine the constitutionality of the Labor interim presumption. This argument is misplaced because the full range of rebuttal criteria in the Labor rule would remain valid even if the Court were to agree with respondents that all of the relevant Part C claimants have a right to *invoke* the interim presumption on terms "not . . . more restrictive" than those prevailing under Part B. *See Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 144 (6th Cir.), *petition for cert. filed*, No. 87-1045 (1987).

Equally misplaced is petitioners' plea for deference to the Secretary. Here, the Secretary promulgated a rule in obvious tension with the statutory mandate without offering any explanation of the rule itself or of its consistency with the statute. She has now offered a rationalization that is inconsistent with her previous de-

scription of the statute, inconsistent with the actual operation of this regulation and with the other regulations she has promulgated, and irrational on its face. In such a context, there is no basis for deference. *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971).

Assuming the invalidity of the Secretary's interim rule, it is clear that appropriate relief should extend to the members of the proposed *Sebben* class—claimants who did not pursue appeals from the denial of their claims. Most of these class members had a special statutory right under 30 U.S.C. § 945 to have their pending or previously denied claims reviewed automatically by the Secretary under new standards comporting with the 1977 Amendments. Congress emphasized that these claimants, having filed potentially valid claims only to see them improperly denied or caught up in huge backlogs, should not be required to take any action to receive the benefit of a review applying the interim presumption. The Secretary, however, effectively denied this benefit to all claimants lacking ten years of mine employment.

This "collateral" right to a Secretarial review cannot, in principle, be enforced through the statutorily provided administrative review process, which is addressed only to substantive eligibility for benefits. Moreover, imposing a requirement of exhaustion of administrative remedies as a prerequisite to enforcement of this right would necessarily cause irreparable harm. Once a claimant is forced to take the step of filing an administrative appeal, the right to an *automatic* review is already lost. In addition, Congress specifically recognized that claimants would not, in most cases, take any steps to initiate a new review. An exhaustion requirement, by requiring claimants to undergo onerous appeals to obtain a valid review, would disqualify most of the affected claimants from receiving any benefits under the 1977 Amendments, contrary to the explicit intent of Congress. For all of these reasons, the *Sebben* class should be allowed to enforce this collateral

right directly in court. *Bowen v. City of New York*, 106 S. Ct. 2022 (1986); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Finally, section 1361, the general mandamus statute, was an appropriate vehicle for enforeing this right. Section 1361 provides authorization for judicial enforcement of clear stautory duties where, as here, other jurisdictional provisions arguably do not apply. Moreover, if respondents have demonstrated a conflict between the interim regulation and a statutory duty that is clear enough to justify invalidation of the regulation, then mandamus relief is also necessarily appropriate.

ARGUMENT

I. THE EXCLUSION OF CLAIMANTS WITH LESS THAN TEN YEARS' EXPOSURE IN THE 1978 LABOR "INTERIM" REGULATION IS PLAINLY INCONSISTENT WITH THE STATUTORY MANDATE.

Although the regulatory provisions at issue here are somewhat complex, a fair reading leads to only one conclusion—that the Secretary failed to promulgate interim standards satisfying the statutory requirement that they "not be more restrictive than the criteria applicable to a claim [under Part B]." 30 U.S.C. § 902(f)(2). The Secretary's interim regulation does contain some medical "criteria" comparable to those in the earlier Part B interim regulation, but, unlike under Part B, use of these criteria to prove compensable disability is limited to miners with ten years of coal mine employment. Those with any less exposure are required to prove their claims under much more stringent medical criteria, and without the benefit of a rebuttable presumption of disability based solely on specified diagnostic tests. For this group of claimants, therefore, the Secretary's "criteria" are dramatically more "restrictive." Moreover, petitioners' attempt to defend this double standard as reflecting a

judgment about the separate issue of "causation" is unavailing.

A. The Secretary's Interim Regulation Is Plainly More "Restrictive" Than Its Predecessor.

There is no doubt that the Secretary's interim presumption regulation excludes claimants who would have qualified under the SSA version of the rule.[27] Under relevant portions of the SSA rule, claimants were required to prove the existence of pneumoconiosis, 20 C.F.R. § 410.490(b)(1)(i), and a causal link between this disease and coal-mine employment, *id.* § 410.490(b)(2), and thereby won the benefit of a rebuttable presumption of total disability. Under the 1978 Labor interim presumption, by contrast, claimants can submit the same direct evidence of pneumoconiosis and causation by coal-mine employment, but, if they cannot also show ten years of such employment, the presumption of disability is denied. 20 C.F.R. § 727.203(a).

It is also clear that the impact of this difference has been substantial in many cases. The history of the black lung program establishes that the chances of prevailing on a claim vary dramatically depending on whether the claimant is eligible to invoke the interim presumption.[28]

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[27] The private petitioners attempt to suggest that the SSA interim presumption was not, *in practice*, applied to claimants with less than ten years of mine exposure. Br. of Petrs. Pittston Coal Group, *et al.* at 11 n.23. This suggestion, however, is contradicted by the applicable case law. *See Cantrell v. Califano*, 578 F.2d 549, 551 (4th Cir. 1973) (*per curiam*) (where Part B claimant lacked ten years of mine exposure, Appeals Council went on to assess evidence of causation directly); *Maxey v. Califano*, 598 F.2d 874, 876 n.3 (4th Cir. 1979) (*per curiam*) (remanding for, *inter alia*, consideration of causation evidence if claimant found to lack ten years' employment).

[28] *See* page 5 *supra*. Prior to 1978, when all Labor adjudications were done under the 1972 version of the "permanent" regulations, the rate of claim approval "hovered between 8-9%," Solomons, *supra* note 14, at 873 n.14, while SSA, applying its version of the interim presumption, was approving a large majority of

This reality is a natural outgrowth of the basic problem that led to the creation of statutory and regulatory presumptions under this program—the fact that "it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal-mine related, or that those diseases are in fact pneumoconiosis." *Mullins, supra*, 108 S. Ct. at 439. In many cases, the outcome depends on whether the claimant is able to shift the burden of proof through the submission of evidence that would not, on its own, definitively establish a total disability due to coal-mine-related pneumoconiosis.

These undisputed facts, we submit, are sufficient to establish that the Secretary did not comply with the requirement of establishing disability criteria "not . . . more restrictive" than those utilized by SSA. *See* 30 U.S.C. § 902(f)(2). This class of claimants, if eligible to utilize the SSA rule, would have had the important advantage of the interim presumption of disability. Under the Labor rule, however, that advantage was denied to them, with predictable results.

Any doubt on this score should be allayed by an examination of the reasons why Congress enacted the "not . . . more restrictive" requirement. Those reasons were essentially twofold. First, as noted above, Congress believed that the old permanent standards, applied to all Part C claimants from 1973 to 1978, were simply unfair. As the 1977 House Report put it, the Secretary of HEW, who promulgated these permanent standards, had "literally saddled the Department of Labor with rigid and difficult medical standards." [29] Abundant testimony at numerous

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claims, Lopatto, *supra* note 14, at 693. Similarly, by 1981, one year after the Secretary stopped applying the Labor version of the interim presumption, the approval rate for newly filed claims again "dropped significantly." *Id.* at 694-95.

[29] H.R. Rep. No. 151, 95th Cong., 1st Sess. 15 (1977), *reprinted in* House Committee Print, *supra* note 14, at 568 (hereinafter "1977 House Report").

hearings led Chairman Carl Perkins, the leading House sponsor of the 1977 Amendments, to conclude that the existing Part C standards were "absolutely ridiculous and shameful" [30] and required claimants "to have one foot in the grave." [31] Yet, under the Secretary's interim rule, these were precisely the standards—including specifically a requirement of *proving* disability—that were used to determine the eligibility of claimants who lacked ten years of mine exposure.[32]

A second congressional concern was the inequitable treatment of claimants who filed before and after the June 30, 1973 deadline that terminated the Part B program and initiated the Part C program. The hearings were replete with discussion of the differences between the two sets of standards,[33] and complaints that uninformed claimants had forfeited any realistic chance for benefits by filing under Part C only days or weeks after the deadline.[34] The final House Report noted these differences, flatly rejected the justifications offered to support them, and indicated that the requirement of "not

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[30] Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor, 95th Cong., 1st Sess. 66 (1977) (hereinafter "1977 House Hearings").

[31] 1973-74 House Hearings, *supra* note 16, at 398.

[32] *See* note 23 *supra*.

[33] *See, e.g.*, 1977 House Hearings, *supra* note 30, at 111 (Statement of Arnold Miller, Pres., UMWA) ("In order to qualify for Federal black lung benefits miners who applied on or after June 30, 1973, must be far sicker than miners who applied before that date."); *id.* at 243 (Statement of Donald Elisburg, Asst. Secy. of Labor) ("[M]any miners . . . have been denied part C benefits despite having medical conditions that would have met the part B criteria.").

[34] *See, e.g.*, 1977 House Hearings, *supra* note 30, at 29-30 (Statement of Willie Anderson); *id.* at 49-50 (Statement of Jerry Rhodes); *id.* at 62 (Statement of Bud Friend); *id.* at 63-64 (Statement of Andrew Morris).

. . . more restrictive" criteria in section 902(f)(2) would deal with the problem.[35] And the final bill preserved this solution, requiring that interim standards at least as generous as SSA's be applied to all claimants until new, *prospectively* applicable permanent standards could be developed.[36] Nevertheless, under the Secretary's rule, this legislative goal was not fully achieved. One class of claimants—miners lacking ten years of mine employment—remained subject to precisely the inequity that Congress sought to eliminate. They were required to meet the onerous permanent standards even though, if they had filed earlier, they would have qualified for the Part B interim presumption.

B. The Regulation Cannot Be Justified As Reflecting A Valid Determination About "Causation" of Pneumoconiosis.

Petitioners do not deny the existence of a large class of claimants who were denied benefits primarily because the Secretary's interim presumption was more restrictive than SSA's. They nevertheless contend that the Secretary's rule comported with the statute because it offered all claimants equally generous "medical" criteria triggering a presumption of "total disability." While one class of claimants—those lacking ten years of mine ex-

[35] 1977 House Report, *supra* note 29, at 15. The report then reprinted a letter in which the Department of Labor had argued for equalization of all Part B and Part C eligibility standards. *Id.* at 15-19.

[36] *See Halon v. Director*, 713 F.2d at 25 ("The plain language of [sections 902(f)(2) and 945] suggests that in cases adjudicated pursuant to section 945 the rules of adjudication will be at least as favorable in the Labor Department as in the Department of Health and Human Services."); *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 Black Lung Rep. 1-627, at 1-631 (Ben. Rev. Bd. 1981) (section 902(f) "reflects Congressional concern for the disparate treatment of Part B and Part C claims under the Act as amended through 1972"); *id.* at 1-634 ("Congress intended the application of a uniform standard for adjudication of all claims filed prior to promulgation of the new" permanent standards).

posure—were barred from using this presumption, petitioners argue that this was merely the indirect result of an additional requirement related not to the issue of "disability," but to the issue of "causation" by coal-mine employment.

This line of argument is simply wrong. To begin with, while Congress did focus primarily on the key feature of the SSA interim rule that made it different from the permanent regulations—a rebuttable presumption of disability based on specified medical evidence—that hardly means that it left the Secretary discretion to incorporate this feature of the SSA rule but erect new barriers to eligibility like a flat requirement of ten years of exposure. To the contrary, Congress made clear its desire to make the presumption available to all of the relevant Part C claimants. And there is literally nothing in the legislative history suggesting that Congress would have permitted this benefit to be denied to claimants through the creation of new categorical barriers to eligibility.

In addition, even assuming that the Secretary retained discretion to create new categorical exclusions relating to issues, like "causation," that are separate from the issue of "disability," the requirement at issue here cannot be justified on that basis. Petitioners' suggestion that the ten-year requirement reflects a determination about causation is so illogical and so inconsistent with the Secretary's other regulations as to be implausible. At the same time, their somewhat contradictory efforts to conjure up a congressional "recognition" to which the Secretary supposedly was responding are totally unsupported.

1. The Secretary Was Not Empowered to Promulgate Any Eligibility Criteria More Restrictive Than Those in the SSA Interim Rule.

There is no doubt that the primary concern of Congress in passing section 902(f)(2) was the issue of disability. After all, it was only in the area of presum-

ing disability that the Part B interim standards and the old Part C permanent standards were materially different. As noted above, the Part B interim standards and the old permanent standards both required claimants to prove the other two elements of a claim—pneumoconiosis and causation—except where certain generally applicable statutory presumptions came into play.

But this obvious fact hardly means that Congress left the Secretary the discretion to erect new eligibility barriers not directly linked to disability *per se*. Such a barrier, after all, would necessarily prevent the achievement of the goals Congress was pursuing. Any new eligibility requirement in the Labor interim rule would predictably disqualify some class of claimants from receiving the benefit Congress wanted to bestow—the right to prove their claim using the interim presumption.[37] This, in turn, would lead to a perpetuation of the unequal treatment of Part B and Part C claimants that Congress sought to eliminate. Indeed, as we have discussed, the Secretary's exclusion of miners lacking ten years of mine employment had precisely these effects.

Faced with this fundamental reality, petitioners present not a shred of evidence that Congress actually anticipated that the Secretary would include new eligibility requirements in the interim rule. The most that they can offer are technical arguments for the proposition that it was plausible for the Secretary to construe the term "criteria" in section 902(f)(2) as referring only to *medical* criteria. For the reasons already stated, these arguments are beside the point, since they ignore the fact that *any* new eligibility requirement would be inconsistent with Congress's clear desire to extend the

[37] As Chairman Perkins put it, the law required the Labor Department to "apply the interim standards to *all* of the claims filed under Part C, at least until such time as the Secretary of Labor promulgates new standards consistent with the authority this legislation gives him." 124 Cong. Rec. 3431 (1978) (emphasis added).

interim presumption of disability to all claimants who filed during a specified time period. In any event, petitioners' arguments for a narrow interpretation of the requirement of "not . . . more restrictive" criteria are wrong on their own terms.

Those arguments begin with the fact that the requirement appears in a definition of "total disability." Petitioners suggest that this placement indicates a legislative intent to *allow* more restrictive "criteria" relating such issues as "causation" by coal-mine employment. The problem with this argument is the fact that "total disability," as defined in section 902(f), specifically incorporates all *three* elements of a successful claim—(1) inability to engage in gainful employment, (2) due to pneumoconiosis, (3) arising out of coal mine employment.[38] Thus, Congress deliberately transformed this statutory phrase into a term of art incorporating an entire range of specific policy judgments involving all aspects of eligibility, including causation.[39] This defini-

[38] The statute thus provides that a miner is considered "totally disabled when *pneumoconiosis* prevents him or her from engaging in gainful employment" requiring skills and abilities comparable to mining. 30 U.S.C. § 902(f)(1)(A) (emphasis added). The definition of "pneumoconiosis," in turn, incorporates the element of causation by providing that it means a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, *arising out of coal mine employment.*" *Id.* § 902(b) (emphasis added). *See also* 20 C.F.R. § 718.204(b) ("*Total disability defined.* "A miner shall be considered totally disabled if . . . *pneumoconiosis* as defined in § 718.201 prevents or prevented the miner [from] performing his or her usual coal mine work . . . .") (first emphasis in original; second added); *id.* § 718.201 (" '[P]neumoconiosis' means a chronic dust disease of the lung [etc.] *arising out of coal mine employment.*") (emphasis added). In this sense the statutory provisions authorizing benefits to those who are "totally disabled due to pneumoconiosis" are redundant. *See* 30 U.S.C. §§ 901(a), 921(a).

[39] Senator Randolph noted that " '[t]otal disability' is listed as a definition, which I think is fair, but the term is substantive as well as descriptive." 123 Cong. Rec. 24239 (1977). And in the 1977

tional section was therefore a natural place to locate a requirement incorporating all aspects of the Part B interim rule.

This reading is confirmed by the legislative history. For example, in announcing the final version of the bill, the conference committee indicated that the "not . . . more restrictive" requirement applied to "the determination of total disability or death due to pneumoconiosis." [40] The phrase "total disability . . . due to pneumoconiosis" is specifically used in the statute to summarize all elements of eligibility, including causation,[41] and was used in precisely the same way in the old SSA interim rule to which Congress was referring in section 902(f)(2).[42] Chairman Perkins then made the breadth of the incorporation even clearer, stating that in the Secretary's reviews of pending or denied claims, "the 'interim' standards are exclusively and unalterably applicable with respect to *every area they now address*, and may not be made or applied more restrictively than they were in the past. . . ." [43]

For similar reasons, the Secretary's current position is not materially aided by the scattered statements in the legislative history suggesting that the "criteria" at issue

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Amendments Congress also used this definitional section to impose on the Secretary of Labor a series of requirements concerning determinations of the presence of *pneumoconiosis*. *See* 30 U.S.C. § 902(f)(1) (incorporating relevant provisions of § 923(b)).

[40] *See* House Conference Report, *supra* note 19, at 16 ("The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 . . . .")

[41] *See* p. 3 *supra*.

[42] *See* 20 C.F.R. § 410.490(b) (a "miner will be presumed to be totally disabled due to pneumoconiosis," and therefore eligible for benefits, if the specified criteria are met).

[43] 124 Cong. Rec. 3426 (1978) (emphasis added).

were "medical" in nature. As petitioners are fully aware, during the relevant period, *all* of the substantive eligibility standards provided either under Part B or under Part C were commonly referred to as the "medical standards" or "medical regulations." [44] This terminology reflects the fact that all three elements of a successful claim for benefits—(1) disability, (2) pneumoconiosis, and (3) causation by coal-mine employment—involve issues that are mainly, if not exclusively, matters of medical expertise.[45] There is thus no reason to believe that these legislative references to "medical" criteria are in any tension with the other indications, discussed above, that Congress intended the complete incorporation of all of the Part B eligibility criteria.

Petitioners attempt to draw support from another usage of the term "criteria' 'in 30 U.S.C. § 902(f)(1)(D), where Congress instructed the Secretary to develop, for inclusion in the new "permanent" regulations, "criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners."

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[44] *See, e.g.*, S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977) (Senate bill "does not require nor preclude the blanket incorporation of any provision now a part of the existing HEW *medical eligibility regulations* (subpart D, 20 C.F.R. Part 410)") (emphasis added); Letter from William Kilberg, Solicitor of Labor, to John Rhinelander, General Counsel, HEW, September 13, 1974, *reprinted in* 1977 House Report, *supra* note 29, at 19 (stating, in the course of arguing for blanket incorporation of all Part B standards in Part C cases, that SSA should "amend its *medical regulations* to permit the use of the interim criteria in Department of Labor cases") (emphasis added); 43 Fed. Reg. 36825 (August 18, 1978) (referring to *all* of the substantive eligibility criteria in 20 C.F.R. Part 727 as "medical criteria for determining eligibility").

[45] Certainly, in common understanding, the issue of the cause of a disabling disease is one that physicians are in the best position to resolve and generally attempt to resolve in the course of providing medical assistance to patients. Indeed, the private petitioners essentially concede that they are relying on a definition of the concept of "medical criteria" that is narrower than normal usage. Br. of Petrs. Pittston Coal Group *et al.* at 27 n.36.

In fact, however, the circumstances make it clear that Congress never intended section 902(f)(2) to refer back to section 902(f)(1)(D), or to have the same specific focus. The language amending Section 902(f)(2) appeared in numerous bills, including two that passed the House,[46] without being accompanied by any reference to criteria for "medical tests." And the new section 902(f)(1)(D) was placed in front of section 902(f)(2) in the conference committee, which was merging features of the House and Senate bills.[47] It follows that there is no basis for assuming any equivalency between these two sections. To the contrary, Congress clearly knew how to refer specifically to criteria for medical *tests*, and did not do so in section 902(f)(2).[48]

But perhaps the most telling evidence in this regard are statements in the Secretary's own regulations, published simultaneously with the new interim rule, which repeatedly describe the "not . . . more restrictive" requirement as covering not just the issue of disability, narrowly defined, but other eligibility criteria as well. Thus, the preamble to the new interim presumption states that, under the 1977 Amendments, "the criteria for determining whether a miner is or was *totally disabled or died due to pneumoconiosis* shall be no more restrictive than the criteria applicable to a claim filed with [SSA] on or before June 30, 1973, under Part B of Title IV of

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[46] *See* H.R. 4544, 95th Cong., 1st Sess. § 7 (1977); H.R. 10760, 94th Cong., 2d Sess. § 7 (1976).

[47] *See* House Conference Report, *supra* note 19, at 16.

[48] *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 143 (6th Cir.), *petition for cert. filed*, No. 87-1045 (1987). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

the Act (the interim *adjudicatory* rules)."[49] As noted above, the phrase "totally disabled due to pneumoconiosis" is used as shorthand for all standards of eligibility including coal-mining causation, both in the statute and in the SSA interim rule. Similarly, the preamble to the new permanent regulations described the statute as broadly mandating that the "standards to be applied in the *adjudication* of [applicable claims] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, with [SSA], ..."[50] All that we seek here is an interim regulation that comports with this description of the statute.

2. *The Ten-Year Limitation in the Labor Interim Rule Could Not Have Been Based on a Determination with Regard to "Causation."*

Even assuming that the Secretary would have been acting within the scope of her authority in creating a new requirement reasonably related to screening out those who lacked the requisite "causation," this is not such a case. This explanation of the ten-year requirement is at once so illogical and so inconsistent with the Secretary's other actions that it deserves to be dismissed

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[49] 20 C.F.R. § 727.200 (emphasis added). The preamble went on to state that "these rules provide additional standards, not available in the [SSA] interim adjudicatory rules, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment." *Id.* This statement, combined with another rule that incorporated provisions from the old SSA eligibility standards, *id.* § 727.4(b), may well have led interested persons to believe that claimants could continue to use the interim presumption if they satisfied the old SSA interim rule. If so, this confusion may help to explain the absence of controversy over the 10-year exclusion in 1978.

[50] 20 C.F.R. § 718.1(b) (emphasis added). *See also Muncy v. Wolfe Creek Collieries Coal Co.*, 3 Black Lung Rep. 1-627, at 1-631 (Ben. Rev. Bd. 1981) ("For the adjudication of the claims, Congress required the Secretary to utilize interim criteria which were no more restrictive than the Health, Education, and Welfare Interim Adjudicatory Rules (20 C.F.R. § 410.490).")

out of hand. Instead, it is clear that the Secretary was either acting inadvertently or was simply seeking a way to narrow the class of claimants who could utilize the interim presumption of disability—a goal flatly contrary to legislative intent.

In assessing the plausibility of petitioners' "causation" explanation, it is important to recognize first that it is an *ipse dixit*. There is nothing in the interim rule itself or in contemporaneous statements associated with its promulgation offering any explanation of why claimants lacking ten years of mine employment were being excluded. To the contrary, this explanation first appeared only years later, in briefs filed by the Secretary to defend that rule.

Moreover, the explanation offered simply does not fit the facts. To begin with, the exclusion of claimants lacking ten years of mine exposure did not serve to screen out those who were ineligible because their impairments were not causally linked with coal mining. Its *only* effect was to shift the burden of proof on the issue of total disability. The reason is that claims excluded from the interim presumption because of the absence of ten years of exposure were then assessed under the 1972 "permanent" standards.[51] Those standards expressly authorized claimants who lacked ten years of exposure to prove coal-mine causation of their impairment.[52] Their main distinctive feature was the absence of a rebuttable presumption of disability.

In addition, the *new* permanent standards proposed simultaneously with the Labor interim rule[53]—and ultimately applicable to claims filed after March 31, 1980—also specifically contemplate that claimants lacking ten years of mine employment may nevertheless prove a causal link between that employment and their pneumoconiosis. 20 C.F.R. § 718.203 ("If a miner who is suffering . . . from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.") It follows that some other explanation is required to justify the Secretary's two rules—*i.e.*, to explain why claimants who would otherwise qualify for the interim presumption are categorically excluded absent ten years of exposure, whereas later claimants, who must prove disability under the new permanent standards, do not face such a categorical exclusion. There can be no basis for applying less onerous "causation" criteria in the latter case than in the former.

At the same time, the Secretary's explanation, even taken at face value, makes no sense. The exclusion at issue here, if viewed as involving the issue of "causation," would suggest an underlying determination that clinically demonstrated "simple pneumoconiosis" is never causally linked to coal-mine exposure absent ten years of such exposure. Thus, a person with 9.5 years of exposure, and direct evidence of dust particles injuring his lungs, is barred from even attempting to prove that this condition was caused by mine employment. And this exclusion applies even where, as in most cases, the miner has never

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[51] *See* note 23 *supra*.

[52] *See* 20 C.F.R. §§ 410.416(b), .456(b).

[53] On April 25, 1978, after the passage of the 1977 Amendments, the Secretary published proposed regulations including (1) new "permanent" eligibility rules to govern future claims (20 C.F.R. Part 718), (2) new "permanent" procedural rules (20 C.F.R. Part 725), and (3) "interim" substantive and procedural rules governing claims previously filed and those filed prior to the effective date of new permanent regulations (20 C.F.R. Part 727). 43 Fed. Reg. 17722 (April 25, 1978). The interim rules and the permanent procedural rules were put into effect on August 18, 1978. 43 Fed. Reg. 36772, 36818. The permanent substantive standards went into effect on March 31, 1980. 45 Fed. Reg. 13678 (Feb. 29, 1980).

been exposed to other dust sources and coal-mine causation is therefore not, in fact, in doubt.[54]

Any semblance of rational support for such a position is destroyed by the fact that the Secretary's regulations, consistent with the intent of Congress,[55] provide that a claimant need only show that his disabling pneumoconiosis "arose *at least in part* out of coal mine employment." 20 C.F.R. § 718.203(a) (emphasis added).[56] Thus, a claimant may satisfy the causation requirement by showing only that a period of coal-mine exposure, *in combination with periods of exposure in non-mining environments*, led to his contracting pneumoconiosis.[57] In light of this standard, the Secretary would have had no basis for determining that ten years of mine exposure was a prerequisite of coal-mine causation, even assuming that she had incorporated such a determination consistently in both the interim and permanent rules.

[54] *See, e.g., Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966, 968 (8th Cir. 1983) (Secretary conceded coal-mine causation of pneumoconiosis in miner who lacked ten years of exposure); *Lynn v. Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. 1-125, at 1-129 (Ben. Rev. Bd. 1981) (Miller, J., dissenting) (involving a claimant with 7.5 years of mine employment) ("The administrative law judge further found that '[s]ince the Claimant held no other jobs in which he was exposed to a dusty environment, it *is accepted as a fact that his pneumoconiosis arose out of his coal-mine work*.'") (emphasis in original). *Cf. Maxey v. Califano*, 598 F.2d 874, 876 n.3 (4th Cir. 1979) (*per curiam*) ("Conversely, if a claimant's non-coal mine employment did not expose him to coal dust, this would be good evidence that his pneumoconiosis arose from his coal mine employment.")

[55] *See* S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) ("It is also intended that traditional workers' compensation principles such as those, for example, which permit a finding of eligibility where the totally disabling condition was significantly related to or aggravated by the occupational exposure be included within such regulations.")

[56] *See also id.* § 718.201 (defining "pneumoconiosis") ("For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."); *id.* § 727.203(b)(3) (Labor interim presumption may be rebutted where, *inter alia*, "[t]he evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment").

Petitioners, in an effort to lend credence to their explanation, each attempt to manufacture a congressional "recognition" in 1977 to which the Secretary purportedly was responding. First, the Secretary asserts that "the evidence before Congress showed that miners with fewer than ten years of coal mine experience rarely contract black lung disease," Br. of Fed. Petrs. at 15, and describes a "recognition by the House" that miners with less than eleven years of mine exposure have "little" pneumoconiosis, *id.* at 24. Even if true, of course, these assertions would only raise the question of why this recognition was not incorporated in the new permanent standards as well. In any event, the facts before Congress were exactly contrary to the Secretary's remarkable characterizations.[58]

[57] *See Stomps v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1533, 1535 (11th Cir. 1987); *Southard v. Director, Office of Workers' Compensation Programs*, 732 F.2d 66, 70-72 (6th Cir. 1984).

[58] We note that it is at least doubtful that Congress would retain a statutory rebuttable presumption of coal-mine causation based on 10 years of exposure plus evidence of pneumoconiosis, *see* 30 U.S.C. § 921(c)(1), if it also supported an irrebuttable presumption of the opposite fact based on one day less of exposure.

Petitioners also point out that three members of Congress submitted written comments during the notice-and-comment period on the proposed regulations in 1978, and did not question the exclusion of miners with less than ten years of exposure. Obviously, however, such after-the-fact comments by individual legislators would have little probative weight even if, unlike here, it were clear that the omission of criticism on this issue was deliberate. *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979); *Quern*

The sole reference offered by the Secretary is to a report of a consultant, James Weeks, appended to the 1977 House Report. 1977 House Report, *supra* note 29, at 30. While Weeks did, as the Secretary notes, cite one study that found "little" pneumoconiosis in the x-rays of miners with less than eleven years' exposure, *id.*, he also cited two other x-ray studies showing significant levels of pneumoconiosis within this group.[59] *Id.* at 35 fig. 2, 36 fig. 4. He went on to lament the underreporting of black lung in x-ray studies, *id.* at 31-32, and to cite as "more reliable," *id.* at 31, an autopsy study that found pneumoconiosis in over *60 percent* of miners with less than ten years of underground exposure, *id.* at 34 (second figure).[60]

As for the private petitioners, they effectively concede that miners with less than ten years of exposure may have "simple pneumoconiosis"—*i.e.*, precisely the condi-

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v. Mandley, 436 U.S. 725, 736 n.10 (1978). Ironically, the Secretary herself rejected some of the express assertions in this letter seeking changes in the regulations to bring them back into line with the Act. Thus, her view apparently is that such a letter provides controlling evidence when it supports her but may be disregarded by her at will.

[59] Weeks stated that the "probability" of black lung "increases regularly" (*i.e.*, in a straight line) after ten years of underground exposure. *Id.* at 30. But, far from suggesting the absence of significant disease in miners with less exposure, he then added that "[s]ome sort of respiratory disease is likely to begin after as little as *one year underground*." *Ibid.* (emphasis added).

[60] This autopsy study was cited repeatedly by Rep. Paul Simon, a key House sponsor of the legislation. *See* 1977 House Hearings, *supra* note 30, at 173-74, 262. In addition, at a hearing in 1975, Representative Daniel Flood discussed in detail results of a study by the National Institute of Occupational Safety and Health showing that the prevalence of pneumoconiosis in miners with less than ten years of exposure ranged from five to 26 percent depending on the type of coal being mined. Black Lung Benefits Reform Act of 1975: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor, 94th Cong., 1st Sess. 4-6 (1975).

tion that triggers the interim presumption. They make the somewhat different, but equally specious, assertion that it was "accepted" by Congress that "*disabling* black lung disease is virtually unknown in miners with fewer than ten years of coal mine exposure." Br. of Petrs. Pittston Coal Group *et al.* at 26 (emphasis added).[61] This characterization is based on a single study that was completed well *after* the passage of the 1977 Amendments and was presented to Congress *in 1981*.[62] In fact, Congress specifically recognized, in 1972 and 1977, that simple pneumoconiosis can be totally disabling.[63]

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[61] *See also id.* at 31-32 ("For a miner with fewer than ten years of exposure, uncontradicted proof presented to Congress showed that *disabling* occupational disease is virtually impossible.") (emphasis added); *id.* at 29 (referring to the "scientific proof amassed by Congress demonstrating no evidence of totally *disabling* pneumoconiosis in short-term miners").

[62] *See* Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. of Ways and Means, 97th Cong., 1st Sess. 30-32 (1981) (reporting a study that was first presented at a conference in October 1979). Petitioners' unsupported assertion that the data in this study were "available" in 1978, Br. at 26 n.35, hardly supports their bald assertion that Congress "accepted" its results.

[63] *See* S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2305, 2317 ("miners with fewer than fifteen years in the mines who are totally disabled and who have X-ray evidence of pneumoconiosis other than complicated pneumoconiosis, who are now eligible for benefits, will remain so under the Committee amendments"); 1977 House Report, *supra* note 29, at 3 ("Total disability may arise due to either simple or complicated pneumoconiosis.") *See also Kaiser Steel Corp. v. Director, Office of Workers Compensation Programs*, 748 F.2d 1426, 1430 (10th Cir. 1984) ("It is a basic premise of the Act that simple pneumoconiosis can in fact cause disability."); Stephens & Hollon, "Closing the Evidentiary Gap: A Review of Circuit Court Opinions Analyzing Federal Black Lung Preseumptions of Entitlement," 83 W. Va. L. Rev. 793, 797 (1981).

More importantly, this argument misses the point.[64] If the Secretary was responding to a congressional recognition about what levels of pneumoconiosis are disabling, then the ten-year requirement must be viewed as reflecting a determination about the issue of *disabiltiy* rather than causation. If so, then even under petitioners' narrow interpretation of the 1977 Amendments, the regulation would still violate that statute. It would be "more restrictive" than the SSA interim rule in its criteria for determining who is totally disabled.

In sum, petitioners simply have not presented a plausible argument for why the exclusion of miners lacking ten years of mine exposure had anything to do with causation. It is far more likely that the Secretary made an inadvertent mistake or, as the private petitioners suggest, disagreed with the statutory mandate concerning how the issue of *total disability* should be resolved.

C. Petitioners' Discussion Of The Applicable Rebuttal Criteria Is Irrelevant.

In lieu of offering a persuasive rationale for barring claimants from using the interim presumption when they lack ten years of exposure, petitioners and *amici* focus a great deal of attention on differences between the rebuttal criteria in the SSA and Labor versions of the interim rule. They argue that the somewhat broader rebuttal criteria make the Labor rule more "restrictive." They further argue that these additional criteria are essential to make the presumption of disability in the rule constitutional.

These arguments are misplaced for one simple reason: the broader rebuttal criteria of section 727.203(b) would

[64] To begin with, it is hard to see how the recognition posited by the private petitioners can explain the Secretary's decision to make the interim presumption available to some claimants who present evidence of simple pneumoconiosis, while denying the presumption to others presenting precisely the same evidence, based merely on their time of mine employment.

be valid regardless of which side were to prevail in this case. Even if, as respondents contend, the Secretary was required to allow *invocation* of the interim presumption by all claimants using criteria "not . . . more restrictive" than SSA's, she was still authorized to create new rebuttal provisions.[65]

This important distinction was drawn by Congress itself when it passed the 1977 Amendments. The conference committee, in deciding to extend the Part B interim presumption to all Part C claims filed prior to the promulgation of new permanent standards, also sought to ensure that the Secretary's new interim presumption would be fully rebuttable. It did so by mandating that "in determining claims under [the interim] criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor." [66] This mandate was then repeated in the preamble to the rebuttal section of the Labor interim presumption—20 C.F.R. § 727.203(b).[67]

We can see no basis for attacking the Secretary's effort to comply with the "all relevant medical evidence" mandate, as expressed in the four rebuttal criteria in section 727.203(b). It follows that the rebuttal provisions are valid and the constitutional concerns raised here are en-

[65] *See Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 144 (6th Cir.), *petition for cert. filed*, No. 87-1045 (1987).

[66] House Conference Report, *supra* note 19, at 16. This standard was already set out in 30 U.S.C. § 923(b). *See Mullins*, 108 S. Ct. at 435. *See also* 124 Cong. Rec. 3426 (1978) (statement of Rep. Perkins) (SSA interim standards apply to Part C "but they may be considered by the Labor Secretary within the context of all relevant medical evidence").

[67] The Secretary has also taken the position that the rebuttal provisions in the SSA interim rule, § 410.490, were not exclusive and thus could not, in any event, control the scope of rebuttal in the Labor version of the rule. *See* 43 Fed. Reg. 36818, 36826 (August 18, 1978).

tirely misplaced.[68] But it should be reemphasized that nothing in the legislative history indicates any compromise in Congress's determination to allow *invocation* of the interim presumption by all claimants, subject to whatever rebuttal criteria the Secretary might develop.[69]

D. There Is No Basis Here For Deferring To The Secretary.

Having presented little or no persuasive evidence supporting the validity of the Secretary's interim rule, petitioners ultimately fall back on a plea for deference to the Secretary's statutory interpretation and explanation of the rule. This plea, of course, is misplaced where, as here, the statute and its history clearly conflict with the Secretary's position. When "Congress has directly spoken to the precise question at issue," and "the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). But even if there were some room for doubt in this case, the usual deference to agency expertise still would have to be tempered, for several reasons.

First, Congress specifically instructed the Secretary, in interpreting the 1977 Amendments, to give the benefit of any doubt to potential claimants.[70] That was hardly done

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[68] See Br. of Petrs. Pittston Coal Group *et al.* at 32-33 ("Were the presumed facts rebuttable, as they are under section 727.203, there would be no valid due process objection.") To be sure, we do not concede that these additional rebuttal criteria are constitutionally required. But this issue simply need not arise, since the rebuttal criteria exist, and comport with the will of Congress.

[69] Thus, while Congress did intend generally to equalize the rights of Part B and Part C claimants, *see* page 19 *supra*, it recognized specifically that there might be some differences *at the rebuttal stage*.

[70] *See* S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977) ("In 1972, the Committee stressed that, in interpreting the amendments, the miner should have the benefit of any doubt. The Committee underscores and reaffirms this position taken in 1972 with respect to the 1977 amendments . . . ."); *Stomps v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1533, 1534-35 (11th Cir. 1987); *Southard v. Director, Office of Workers' Compensation Programs*, 732 F.2d 66, 71 (6th Cir. 1984). *See also* 20 C.F.R. § 718.3(c) (acknowledging this obligation).

here. Moreover, we are dealing with a statutory interpretation and an explanation of a regulation that both appeared for the first time in briefs defending the regulation after the fact. As noted above, the Secretary's contemporaneous descriptions of the 1977 Amendments include no suggestion that the legislative incorporation of the Part B eligibility criteria was anything less than complete—indeed quite the contrary.[71] And the administrative record never in any way attempts to explain the exclusion of miners lacking ten years of mine employment as reflecting a determination related to "causation."

In such a context, the *post hoc* rationalizations offered by counsel for the Government are *not* accorded deference.[72] Where the responsible administrative official did not address the statutory requirements in promulgating a regulation, the later explanations offered in litigation are "hardly tantamount to an administrative interpretation." *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971). "It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Id.* "If he faces such questions only after he has acted, there is substantial danger that the

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[71] *See* pages 26-27 *supra*.

[72] *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 n.17 (1980) (little deference accorded to an administrative interpretation that was "primarily litigation inspired"); *Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (*en banc*) ("There is some question, to begin with, whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for purposes of *Chevron*."), *aff'd*, 108 S. Ct. 271 (1987).

momentum generated by initial approval may seriously impair the enforcement of the . . . laws that Congress enacted." *Id. See also Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983).

These principles are, of course, all the more applicable where, as here, the rationalizations of counsel make no sense and are inconsistent with other regulations promulgated by the agency.[73] It is clear in this case that the Secretary did not and could not have intended the exclusion of miners lacking ten years of mine exposure as a "causation" criterion. The only plausible explanations are (1) that the Secretary adopted this exclusion by mistake, in a regulation that was rushed into place,[74] or (2) that the Department undertook a deliberate effort to narrow the impact of a statutory mandate that it had come to oppose.[75] In either case, the arguments for deference to the Secretary evaporate.[76]

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[73] *See Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (*en banc*) (*Chevron* principle of deference "cannot possibly have application where counsel's interpretation in fact does *not* explain agency action"), *aff'd*, 108 S. Ct. 271 (1987).

[74] The 1977 Amendments were signed into law on March 1, 1978. The proposed new interim rule was published on April 25, 1978, 43 Fed. Reg. 17765, and interested persons were given only 30 days in which to submit comments, *id.* The new rule was put into effect on August 18, 1978. 43 Fed. Reg. 36818.

[75] By 1977, the Department had reversed its previous position and was seeking the right to promulgate new standards for all claimants, unconstrained by any reference to the Part B standards. *See* 1977 House Hearings, *supra* note 30, at 243-44 (statement of Donald Elisburg, Asst. Secy. of Labor); Solomons, *supra* note 14, at 889-90.

[76] The private petitioners also argue that even if section 727.203(a) is illegally restrictive, claimants have no right to invoke the more generous criteria of section 410.490 until the Secretary promulgates a new rule. Br. of Petrs. Pittston Coal Group *et al.* at 20 n.30. This argument ignores the fact that Congress created a statutory right to application of criteria at least as generous as those in section 410.490.

II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THE RIGHT OF *SEBBEN* CLASS MEMBERS TO HAVE THEIR CLAIMS REVIEWED UNDER VALID CRITERIA COULD BE VINDICATED UNDER 28 U.S.C. § 1361.

In addition to mounting an unsuccessful defense of the Secretary's rule, petitioners also argue that only individual claimants with still-pending cases—like the respondents in *Broyles*—have a right to relief based on the illegality of that rule. In their view, the members of the proposed class in *Sebben* are without any remedy even though it is clear that the primary reason for the denial of benefits in many of these cases was the Secretary's decision to promulgate an interim regulation that illegally denied them any real assistance as a result of the 1977 Amendments. This argument, in the particular circumstances of this case, cannot prevail.

A. The Right At Stake Is Collateral To The Issue Of Eligibility For Benefits And Is Inconsistent With A Requirement Of Exhaustion Of Administrative Remedies.

All of the petitioners' arguments for foreclosing relief for the *Sebben* class members—timeliness, failure to exhaust, and *res judicata*—are premised on the single assertion that these claimants had available, but passed up, an appropriate remedy to redress their illegal exclusion from eligibility to utilize the interim presumption. That remedy is the administrative appeals process incorporated into the statute, culminating in review in a United States court of appeals.[77] Petitioners argue, in essence, that this remedy is exclusive.

In so arguing, however, petitioners ignore the nature of the right at stake here. At least with respect to claimants who had claims denied or pending prior to the effective date of the 1977 Amendments, Congress created

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[77] *See* 30 U.S.C. § 932(a) (incorporating provisions of the Longshore and Harbor Workers' Compensation Act).

a right to *automatic* Secretarial review of the files applying a rebuttable presumption of total disability based on evidence of simple pneumoconiosis and coal-mine causation. 30 U.S.C. § 945(b). Because these claimants were categorically excluded from application of the Secretary's interim presumption, no reviews satisfying the statute ever took place. Instead, the Secretary went through the largely meaningless exercise of reviewing files under the 1972 "permanent" standards. These were standards that not only had already been applied to deny many of the relevant claims, but had been determined by Congress to be unfair and inconsistent with the statute.

Congress's decision to specify a right to *sua sponte* review of files makes this case different from the more usual context where a statute merely creates a substantive right to benefits. *Cf. Heckler v. Ringer*, 466 U.S. 602 (1984). Here, the Secretary was specifically directed to apply revised standards to pending or denied claims without requiring the claimants to do anything whatsoever to trigger these reviews. In such a special context, the Secretary cannot defend against a class action seeking to enforce this duty on the ground that each member of the proposed class should first have exhausted all levels of administrative and judicial review after being informed of the negative results of the Secretary's largely meaningless reviews.

This Court has recognized that, under appropriate circumstances, exhaustion of specific administrative and judicial review mechanisms is not a prerequisite to direct judicial enforcement of a statutory right. *See Bowen v. City of New York*, 106 S. Ct. 2022, 2031 (1986); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976). Under these precedents, a claimant seeking to go directly to Court must show two things. First, the right at stake must be "collateral" to the main issue in the administrative review process—*i.e.*, eligibility for benefits. Second, there must be a risk of irreparable harm caused by deferring enforcement of this collateral right until after exhaustion has occurred.

Thus, in *Mathews v. Eldridge*, the Court allowed a claimant to go directly to court to assert a constitutional right to a pre-deprivation hearing, noting that this collateral right would necessarily be forfeited if its enforcement were delayed until after exhaustion of *post*-deprivation remedies. 424 U.S. at 331. And in *Bowen v. City of New York*, the Court allowed a class of Social Security claimants to redress a denial of a valid first-level review of their level of disability, even though they had not pursued appeals from that first administrative level. It held that the right to have a claim assessed under valid criteria at the first stage was collateral to the issue of benefits, and relied on the fact that mentally disabled persons may suffer irreparable harm merely by virtue of being required to pursue unnecessary administrative appeals. 106 S. Ct. at 2027.

This case falls into the same narrow class of cases where the requirement of exhaustion does not apply. To begin with, the collateral right here—the right to an *automatic* Secretarial review under revised criteria—is both clearer and more specific than the right to a valid first-level disability assessment vindicated in *Bowen*. Congress quite deliberately [78] instructed the Secretary to review *every* pending or denied Part C file and to "approve any such claim *forthwith* if the provisions of this part, as so amended, require that approval." [79] It further instructed the Secretary not to "require any additional medical or other evidence to be submitted if the evidence on file is sufficient for approval of the claim." [80] The legislative history emphasizes repeatedly that claimants

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[78] This requirement stands in stark contrast with the provisions of section 945(a)(1), which mandated file reviews by SSA triggered only by *requests* from claimants.

[79] 30 U.S.C. § 945(b)(1) (emphasis added).

[80] *Id.* § 945(b)(2)(A).

were not to be required to do *anything* in order to receive these reviews.[81]

Congress created this unusual requirement because of serious concerns about the Secretary's previous administration of Part C. As noted above, it recognized that the 1972 permanent regulations had led to a multitude of denials of benefits to claimants who were disabled and otherwise eligible within the meaning of the statute. And it also knew that tens of thousands of claimants had been waiting years without any disposition of their claims. As one House staffer put it in 1978, a whole class of miners, who already were suffering "the slow, emaciating violence of disease," had then been inflicted with an "additional and more insidious form of violence, the violence of governmental institutions—that of indifference, inaction, obfuscation, and delay." [82]

In response to this recognition, Congress mandated that affected claimants, having already filed potentially valid claims, not be required to take any further action. In so doing, it was merely accepting the practical reality that many of the claimants, who had already been denied or had been waiting years for some disposition, would not take further steps to renew their claims.

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[81] *See, e.g.*, House Conference Report, *supra* note 19, at 21 ("the conference substitute also requires the Secretary of Labor to *automatically* review all currently denied or pending part C claims", (emphasis added); 124 Cong. Rec. 3426 (1978) (statement of Rep. Perkins) ("The House bill's provision of automatic review of all denied or pending claims in light of the changes in the law . . . is retained in substance. Every such claimant is absolutely entitled to such a review . . . ."). *See also* 124 Cong. Rec. 6260 (1978) (reprinting a Dept. of Labor description of the 1977 Amendments) ("Any coal miner or dependent survivor whose claim for black lung benefits has been previously denied, or is still pending a decision by the *Department of Labor* (DOL), will have their claim *automatically* reviewed. This review will consider the evidence already in the claim file in light of the 1977 amendments and will be done *without filing a new claim.*") (all emphasis in original).

[82] McGillicuddy, *supra* note 14, at 1241.

Thus, the decision to mandate "automatic and expedited review" reflected a "strongly held belief . . . that the actions of the administrative agencies, in the past, have been almost as spiritually destructive and crippling of the subjects of this program as has the disease itself." [83]

This description of the nature and origins of the collateral right to Secretarial reviews also serves to demonstrate the irreparable harm that would arise if exhaustion of administrative remedies were deemed a prerequisite to enforcement of the right. First, in principle, a right to *automatic* review—like the right to a predeprivation hearing in *Mathews v. Eldridge*—is irretrievably lost if a claimant is required to go through layers of administrative review to enforce it. At that point, of course, the review is no longer "automatic."

Moreover, for the reasons stated here, the consequences of that loss are far from trivial. Congress created the Secretary's quasi-fiduciary review obligations in order to assure that all claimants would have 1977 Amendments applied to their claims. In light of the previous mishandling of the program, it knew that even a requirement that claimants request a review would lead directly to forfeiture of the right by many claimants. The Secretary, having been given this specially protective duty, in effect forced all claimants lacking ten years of mine exposure to pursue several levels of administrative and judicial review before obtaining the right to a review complying with the statutory standards. Thousands, of course, failed to do so,[84] and are now told by the Government that they will never receive a review complying with the statute. In light of the mandate of section 945, such an outcome simply cannot be countenanced.

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[83] *Ibid.*

[84] Prior to the 1977 Amendments, only 11% of initially denied Part C claimants requested hearings before ALJs. Snyder & Solomons, "Black Lung: A Study in Occupational Disease Com-

Petitioners attempt to distinguish *Bowen* on the ground that it involved a *secret* policy of denying valid, first-level disability assessments. It is true that the secret nature of the illegal policy in *Bowen* was a relevant factor because it prevented claimants from knowing about, and seeking to redress, a violation of their rights. But here we have a specific congressional finding that the relevant claimants would not vindicate their rights if forced to *request* reconsideration under the 1977 Amendments. This problem, in turn, was created by the massive mishandling of the program that Congress was seeking to redress. In such a context, the public nature of the Secretary's illegal regulation is not a sufficient reason for distinguishing this case from *Bowen*.

Petitioners also argue that if class members had pursued appeals, they might long ago have received benefits. But the same was true in *Bowen*. Indeed, there, the illegal policy affected only the first level of disability assessment. Claimants could obtain application of valid criteria simply by seeking an ALJ hearing. Here, by contrast, the Secretary's illegal regulation was fully applicable at the ALJ hearing stage, and could only be challenged before the Benefits Review Board or in a court of appeals.

For all of these reasons, it is clear that the *Sebben* class members have a collateral right to a valid review and that enforcment of that right should not be tied in

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pensation" (1976), *reprinted in* Subcomm. on Labor of the House Comm. on Educ. & Labor, 94th Cong., 2d Sess., Proceedings of the Interdepartmental Workers' Compensation Task Force Conference on Occupational Diseases and Workers' Compensation 799 (Comm. Print 1976). One of the primary reasons was the general absence of legal representation. *Id.* When, years later, these same claimants were informed (1) that their claims had been reviewed by the Secretary under 1977 Amendments, (2) that they were required to prove total disability because they did not have ten years of mine employment, and (3) that their previous files still failed to show such disability, they were hardly likely to preserve their statutory rights by seeking a full hearing before an ALJ.

any way to the timely completion of the administrative and judicial reviews provided by statute. It follows as well that there has been no ruling on *this* right, and that petitioners *res judicata* arguments are therefore entirely misplaced.[85]

Equally misplaced are the efforts of petitioners and *amici* to support their legal arguments with dire predictions of the effects of a ruling in favor of the *Sebben* class. It is, of course, likely that requiring reconsideration of the claims of these miners under legally valid criteria will create some administrative burdens and will increase the costs of the program. However, we note that all parties have been on notice regarding this problem with the interim regulation since at least 1981.[86]

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[85] Two other categories of claimants bear special mention. The Eighth Circuit's definition of the proposed class includes some claimants who filed unsuccessfully under Part B between 1969 and 1973. U.S. Pet. App. 18a. Those Part B claimants whose claims were pending or denied as of the enactment of the 1977 Amendments had a right to request a review by the Secretary of Labor preceded, at their option, by a review by the Secretary of Health and Human Services. *See* 30 U.S.C. § 945(a). Part B claimants who requested such reviews were affected by the scope of section 727.203(a)(1) and thus were properly included in the class.

The Eighth Circuit also included in the class those Part C claimants who filed after the effective date of the 1977 Amendments and prior to March 31, 1980—the effective date of the new permanent standards. These claimants had a right to assessment under criteria "not . . . more restrictive" than SSA's, 30 U.S.C. § 902(f)(2)(C), but they did not, of course, have a right to a *review* of an *existing* claim under section 945. The question whether these claimants should be excused from exhaustion depends on whether, in the particular circumstances of this case, the Secretary could properly demand such exhaustion in order to avoid application of a flatly illegal regulation. The Eighth Circuit concluded, properly in our view, that the history of repeated congressional reopening of claims denied under unduly restrictive regulations indicates that exhaustion should not be the rule in this special context. U.S. Pet. App. 11a-12a, 16a.

[86] *See Lynn v. Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. 1-125, at 1-128 (Ben. Rev. Bd. 1981) (Miller, J., dissenting).

Moreover, the Secretarial reviews at issue here can be conducted quite expeditiously.[87] As for the financial predictions offered here, they are largely based on the incorrect assumption that the Labor *rebuttal* provisions would also be eliminated[88] and are, in any event, inconsistent with the views previously stated by the Secretary.[89]

B. An Action Under 28 U.S.C. § 1361 Was An Appropriate Vehicle For Vindicating This Collateral Right.

In *Bowen* and *Heckler*, the jurisdiction of the federal courts was predicated on a specific provision of the Social Security Act, 42 U.S.C. § 405(g), while the time limitations and exhaustion requirements usually applicable under that provision were waived. Here, by contrast, jurisdiction was premised on the general mandamus statute, 28 U.S.C. § 1361. This difference, however, should not affect the outcome.

The selection of section 1361 as a jurisdictional basis in this case reflects the particular features of the Black Lung Benefits Act. First, the specific judicial review provision incorporated in that Act, 33 U.S.C. § 921(c), provides only for appeals to the federal courts of appeals from "final orders" of the Benefits Review Board. Here, there could be no final order of the Board if respondents were to vindicate their right to receive an automatic

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[87] The Secretary estimates that she would be required to review 94,000 claims. Br. at 38. In 1980 alone, the Department issued 145,700 determinations on reviewed or newly filed claims. Secy. of Labor, Annual Report to Congress on the Black Lung Program 4 (1980).

[88] *See* Brief of *Amici* National Council of Compensation Insurance *et al.* at 9 & n.9; Brief of Petrs. Pittston Coal Group *et al.* at 4 & n.7 (incorporating the estimate of *amici*).

[89] *See* Petition for the Secy. of Labor *et al.* in *Sebben* at 12 (interim presumption of disability likely, in most cases, to be rebutted). As noted earlier, most of the potential liability here would be borne by the federal Black Lung Disability Trust Fund.

Secretarial review without being required to exahust administrative remedies.

In the absence of a specific, applicable review statute, the usual approach would be to seek "non-statutory" review of an administrative action in district court under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702.[90] Indeed, with only a few exceptions, such a procedure has largely eliminated the need for mandamus actions under section 1361. *See* 4 K. Davis, *Administrative Law Treatise* § 23.11, at 166. However, under the Federal Coal Mine Safety Act, of which the Black Lung program is a part, the judicial review provisions of the APA are not applicable. 30 U.S.C. § 956. It was therefore probably more appropriate to rely on section 1361.[91]

Numerous courts have recognized that section 1361 can be an appropriate way to vindicate a collateral right like that at issue in *Bowen v. City of New York*.[92] The

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[90] *See, e.g., Nader v. Volpe*, 466 F.2d 261, 269 (D.C. Cir. 1972). The possibility of such an action under the Black Lung Benefits Act has been specifically recognized. *See Louisville & Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Compensation Dept. of District Five, UMW v. Marshall*, 667 F.2d 336, 343 (3d Cir. 1981).

[91] There is authority for the proposition that a section 1331 suit could have been brought even without the APA. *See, e.g., Olegario v. United States*, 629 F.2d 204, 224 n.9 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). If so, then the proper course of action would be to affirm the judgment below under this alternate jurisdictional theory. *See Ganem v. Heckler*, 746 F.2d 844, 848-49 (D.C. Cir. 1984).

[92] *See, e.g., Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984); *City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984), *aff'd on other grounds sub nom. Bowen v. City of New York*, 476 U.S. 467 (1986); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 968-69 (8th Cir. 1983); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir.), *vacated and remanded on other grounds*, 469 U.S. 977 (1984); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983). These cases have arisen under the Social Security Act because of

basic requirements are that the plaintiff show a "clear nondiscretionary duty" for which there is no other appropriate avenue of relief. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). These requirements are clearly satisfied where a claimant establishes (1) the existence of a clear collateral right that cannot await exhaustion without causing irreparable harm, and (2) the absence of another applicable jurisdictional theory. *See Kuehner v. Schweiker*, *supra*, 717 F.2d at 827-28 (Becker, J., concurring) (jurisdictional analysis under *Mathews v. Eldridge* and section 1361 is esssentially the same).

Petitioners attempt to suggest that, even if otherwise applicable, the mandamus statute could not apply here because the statutory duty is not sufficiently clear. In essence, they assert that the complexity of the statute, by itself, creates enough "discretion" to insulate the Secretary from mandamus scrutiny. This argument, however, is without substance. If respondents have carried the burden of showing a clear inconsistency between the statute and the regulation within the meaning of *Chevron, U.S.A., supra*, then there can be no doubt about the existence of a "clear duty" enforceable through mandamus.[93] To be sure, under *Chevron, U.S.A.*, as well as under section 1361, there are occasions when the proper interpretation of a statute requires use of the traditional tools of statutory construction.[94] But the existence of

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uncertainty about whether 42 U.S.C. § 405(h) bars all other forms of jurisdiction.

[93] Petitioners cannot dispute the proposition that the Secretary had a separate "clear duty" to conduct reviews under section 945 applying standards conforming with the statute. *See* 124 Cong. Rec. 3426 (1978) (statement of Rep. Perkins) ("Every such claimant is *absolutely entitled* to such a review . . . .") (emphasis added).

[94] *See Chevron, U.S.A.*, 467 U.S. at 843 n.9. ("If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") (emphasis added); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930)

such a need for interpretation does not by itself prevent the use of a mandamus remedy, where the interpretive process establishes a clear duty.[95] Here, despite the relative complexity of the statute and regulations, such a duty is clear, and the Secretary has no basis for claiming an exemption from the remedy of mandamus.

CONCLUSION

For the reasons stated, the decision below should be affirmed.

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(even if statute "must be read and in a sense construed to ascertain what is required," mandamus may be appropriate); *Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984) ("The central issue in every mandamus case must be the 'proper interpretation of the particular statute and the congressional purpose.'") (quoting *Work v. United States ex rel. Rives*, 267 U.S. 175, 178 (1925)); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) ("It is no bar to [mandamus] relief that the court [is] required to interpret [the governing law] to determine the precise scope of the agency's duties.")

[95] The cases cited by petitioners involve situations where the statute was so ambiguous that it would not have met the *Chevron, U.S.A.*, standard for overcoming deference to administrative expertise. *See, e.g., Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958) (claimant raising "matters of doubtful or highly debatable inference from large or loose statutory terms"); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930) (mandamus inappropriate where statutory duty is not "plainly prescribed" but depends on a doubtful statutory construction.

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STATEMENT

A. Charlie Broyles And Bill Colley

Respondent Charlie Broyles and Respondent Lisa Kay Colley's father, Bill Colley,[1] were coal miners. Charlie Broyles worked in the mines of Virginia for five years as a "coal loader" and as a "track man." (B. App. 11a; Broyles In. Dep. of Charlie Broyles, Dep. pp. 5-8; Broyles In. Dir. Ex. 2, Claim Form CM-911a, p. 1; Broyles In. Dir. Ex. 5, Claim Form CM-913, p. 1)[2] Both jobs involved heavy exposure to coal dust. (Broyles In. Dep. of Charlie Broyles, Dep. pp. 6-9; Broyles In. Dir. Ex. 5, Claim Form CM-913, p. 4) Bill Colley worked in the coal mines of Kentucky and West Virginia for at least nine and one-half years, sometimes moving carloads of coal from inside the mine to the outside and sometimes as a machine operator, a job that also involved heavy exposure to coal dust. (B. App. 24a-25a; Colley In. Tr. of Hearing, Tr., pp. 10-11, 16-17)[3]

Bill Colley and Charlie Broyles filed claims for disability benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (1982 & Supp. III 1985) (the "Act"),[4] in 1974 and 1976,

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[1] Bill Colley died in 1986, and his surviving daughter, Lisa Kay Colley, was substituted for him in the court of appeals.

[2] Citations such as "B. App. 11a" are to pages of the Appendix to the Solicitor General's Petition for Writ of Certiorari in No. 87-1095. Citations to record items not in the Appendix have three parts: (a) the item's designation in the "Index of Documents" that the Department of Labor prepares for each case appealed from the Benefits Review Board to a court of appeals (*e.g.*, "Broyles In. Dir. Ex. 2;" "Colley In. Tr. of Hearing"); (b) the name of the record item (*e.g.*, "Tr."); and (c) the relevant pages of that record item (*e.g.*, "Tr., pp. 10-11").

[3] Bill Colley introduced evidence that he had worked in the coal mines for at least twelve and one-half years. (B. App. 24a-25a) However, the administrative law judge who heard his claim found that his "qualifying miner work would not exceed 9.5 years." (B. App. 25a)

[4] The Act began as Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). In 1972, Title IV was amended by and became known as the Black Lung Benefits Act. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 1, 86 Stat. 150 (1972). In their brief on the merits ("Secy. Br."), the federal petitioners (collectively referred to here as the "Secretary") cite the post-1972 amendments to the Act. Secy. Br. at 3 and n. 1.

respectively. (B. App. 4a) Both claimants contended that they were "totally disabled" due to "pneumoconiosis" arising "out of [their coal mine] employment"[5] and were therefore entitled to the benefits the Act provided. 30 U.S.C. § 901(a). After imposing on them the burden to prove their eligibility under the so-called "permanent" regulations at 20 C.F.R. Part 410,[6] the Secretary of Labor denied their claims. (B. App. 9a, 21a) The claimants appealed this denial to the Fourth Circuit, urging that under Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), they were entitled to have their eligibility determined not under the permanent Part 410 regulations but instead under "criteria . . . not . . . more restrictive" than those in the HEW

[5] Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." *Stedman's Medical Dictionary* 1108 (24th ed. 1982). The Act defines "pneumoconiosis" differently as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments, arising out of coal mine employment.*" 30 U.S.C. § 902(b) (emphasis added). The statutory definition of "pneumoconiosis" is therefore broader than the medical one in that it includes *all* respiratory and pulmonary impairments arising out of coal mine employment. But the statutory definition is also narrower than the medical one in that it encompasses only conditions arising out of coal mine employment, not other types of work. In the statutory context, therefore, to refer to "pneumoconiosis arising out of coal mine employment" is, strictly speaking, redundant. As does the Secretary, however, we distinguish the existence of the medical disease from the question of whether it arose out of coal mine employment when to do so is clarifying.

[6] All citations to 20 C.F.R. are to the 1987 edition unless otherwise indicated. The numerous citations in this brief to provisions of 20 C.F.R. usually omit the "20 C.F.R." reference. However, when we refer to the two principal regulatory provisions at issue here, we usually call them by their popular names: the "HEW interim presumption" or the "HEW interim regulation" (§ 410.490) and the "DOL interim presumption" or the "DOL interim regulation" (§ 727.203).

interim presumption at § 410.490. (B. App. 3a-5a) Under this provision, claimants who present evidence meeting specified requirements obtain the benefit of a favorable presumption of disability, which shifts the burden to the Secretary to disprove one or more elements of a claim.

As described more fully below, a Fourth Circuit panel unanimously accepted the black lung claimants' contention that the Secretary had applied an unlawfully harsh eligibility standard to their cases. (*Id.* at 1a-6a) Accordingly, the court remanded their cases to the Secretary to make new eligibility determinations under the proper criteria. (*Id.* at 5a-6a) Charlie Broyles and Lisa Colley, seeking to secure the disability benefits Congress intended for them, are now before this Court to defend that ruling.

B. The Black Lung Benefits Act And The Interim Presumptions

"Part B" of the original 1969 statute instructed the Secretary of Health, Education, and Welfare ("HEW") to process claims for black lung disability benefits filed between December 31, 1969 and December 31, 1972 and to pay, from appropriated federal funds, benefits to miners found eligible. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(a), 83 Stat. 793 (1969). "Part C" of the statute instructed the Secretary of Labor to process claims filed after December 31, 1972. *Id.* at § 422, 83 Stat. 796. These claims were to be paid by the miner's coal mine employer, *id.* at § 422(b), 83 Stat. 796, or if no coal mine employer could be identified due to insolvency or bankruptcy, then from federal funds. *Id.* at § 424, 83 Stat. 798.

HEW approved almost fifty percent of the black lung benefit claims it adjudicated in the first three years of the program. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972). Congress concluded, however, that this approval rate was too low, asserting its concern that, "as provided by Congress in 1969 and as interpreted by the Social Security Administration, the provi-

sions authorizing benefits for total disability due to pneumoconiosis do not in fact benefit countless miners and their survivors who were the intended beneficiaries of the Black Lung program." *Id.* Congress recognized that deserving miners were being denied benefits because the "state of the [medical] art" was inadequate to ensure medical diagnoses of either disease or disability in many miners who were in fact "severely . . . impaired" from pneumoconiosis. *Id.* at 9. The lack of adequate medical facilities in the coal mine areas to perform diagnostic testing compounded the difficulties many miners faced in establishing the required medical proof. *Id.* at 18. Disturbed that HEW had not adjudicated a large volume of claims that miners had filed, Congress attributed the backlog to deficiencies in testing procedures and facilities that made both proof and adjudication of claims more time consuming and difficult. *Id.* at 23.

Because of its dissatisfaction with the low claims approval rate and the backlog of claims, Congress amended the Act in 1972 to make establishing eligibility easier. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[7] In addition, the Senate Labor and Public Welfare Committee expressed its expectation that HEW would "adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims." S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). HEW responded to these amendments and the Committee's expecta-

[7] For example, Congress redefined "total disability" so that a claimant no longer had to prove that he was physically disabled from performing *any* job, but could establish eligibility if he could show that he was unable to engage in his usual coal mine work or comparable work. Pub. L. No. 92-303 at § 4(a), 86 Stat. 153 (amending Section 402(f) of the Act). Congress also provided that a benefit claim could no longer be denied solely on the basis of an x-ray read as "negative" for pneumoconiosis. *Id.* at § 4(f), 86 Stat. 154 (amending Section 413(b) of the Act).

tion by promulgating the HEW interim presumption at § 410.490. § 410.490(a).

Under the HEW interim regulation, a claimant could invoke a rebuttable presumption that he was "totally disabled due to pneumoconiosis" if he submitted certain specified types of evidence. As relevant here, a claimant could invoke this presumption if he proved both that he had pneumoconiosis (through x-ray, biopsy, or autopsy evidence) and that his pneumoconiosis arose out of coal mine employment. §§ 410.490(b)(1)(i), 410.490(b)(2). A claimant could meet the latter requirement, proof of disease causation, in two ways: either by introducing direct evidence of disease causation or by invoking a separate, special presumption of disease causation through showing that he had ten years of coal mining experience. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456). Once the main presumption was invoked, the burden of proof shifted to the Secretary to show that the claimant was not "totally disabled." § 410.490(c).

Under the original 1969 Act, only HEW had the authority to promulgate regulations governing the determination of eligibility. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(b), 83 Stat. 793 (1969). The 1972 amendments kept this arrangement even for the Part C claims filed after July 1, 1973 for which the Secretary of Labor had processing responsibility. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[8] While HEW applied the burden-shifting interim presumption to Part B claims, it did not authorize DOL to apply the presumption to Part C claims. § 410.490(a). Instead, HEW required DOL to adjudicate its claims under the Part 410 "permanent" regulations, *see id.*, adopted the same day as the HEW interim presumption. 37

[8] The 1972 amendments to the Act postponed the commencement of the Secretary of Labor's jurisdictional responsibility under Part C from January 1, 1973 to July 1, 1973. Pub. L. No. 92-303, § 5, 86 Stat. 155 (1972).

Fed. Reg. 20641 (1972). Unlike the HEW interim presumption, the permanent regulations did not offer the claimant any opportunity to invoke a presumption of "total disability" that would shift the burden of proof to the Secretary or to the coal mine operator. §§ 410.401-410.476. Rather, a claimant was required to prove affirmatively every element of his claim: that he was (a) totally disabled, (b) by pneumoconiosis, (c) arising out of coal mine employment. §§ 410.422-410.426, 410.414, 410.416.

The distinctions between the liberal HEW interim presumption applied to Part B claims and the strict permanent regulations applied to Part C claims generated dramatically different approval rates for Part B and Part C claims. As the Part B "claims approval rate increased, Labor's remained low." *Mullins Coal Co.* v. *Director, O.W.C.P.*, 108 S. Ct. 427, 437 (1987).[9]

Evidence presented to Congress in the years after the initiation of the Part C program demonstrated the persistence of the

[9] DOL, operating under the Part 410 permanent regulations, approved less than ten percent of the claims it adjudicated prior to the 1978 amendments. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 873 n. 14 (1981). HEW, in contrast, operating under its interim presumption, approved seventy percent of the claims it adjudicated by 1976. Speech by Robert D. McGillicuddy, Assistant to the Staff Director of the House Subcomm. on Labor Standards Before the Legal Staff of the Benefits Review Board (Sept. 26, 1978), *reprinted in* House Comm. on Education and Labor, 96th Cong., 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, 1236 (Comm. Print 1979); *see also* Letter from William J. Kilberg, Solicitor of Labor, to John B. Rhinelander, General Counsel, HEW (September 13, 1974) [hereinafter "DOL Solicitor Letter"], *reprinted in* H.R. Rep. No. 151, 95th Cong., 1st Sess. 17 (1977) ("[M]any of those claimants who can meet the interim criteria, but not the 1969 criteria are, in fact, totally disabled and should be entitled to benefits.")

problems that had led to promulgation of the HEW interim presumption—deficiencies in medical test procedures and an insufficient number of adequate medical testing facilities. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15 (1977). *See Mullins*, 108 S. Ct. at 436. To several congressmen, these problems explained why DOL had denied benefits to so many of their constituents, even though the congressmen, having personally observed that these claimants had substantial breathing difficulties, believed that they were totally disabled. *See, e.g., Black Lung Benefits Reform Act of 1975: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcomm. on Labor Standards of the House Comm. On Education and Labor*, 94th Cong., 1st Sess. 144 (1975) [hereinafter *1975 Hearings*] (remarks of Rep. Perkins); 122 Cong. Rec. 4978 (1976) (remarks of Rep. Daniels). Finally, like HEW previously, DOL developed a large claims backlog requiring claimants to suffer long delays in the processing of their claims. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 251 (1977) [hereinafter *1977 Benefits Provisions Hearings*] (testimony of Donald Elisburg, Assistant Secretary of Labor). Legislators expressed dismay over these delays. *E.g., id.* at 231 (testimony of Rep. Ertel).

Just as the low HEW claims approval rate had prompted legislation in 1972 to increase approvals in the Part B program, the much lower DOL approval rate prompted new legislative proposals to achieve the same end under the Part C program. In particular, representatives from coal mining states introduced a series of bills between 1975 and 1977 to require the Secretary of Labor to apply the HEW interim presumption to all claims. *See* pp. 28-29 and n. 28 *infra*. Such measures sought to cure the low approval rate under the Part C program by the same means (the HEW interim presumption) that HEW had developed in response to Congress' earlier dissatisfaction with the approval rate under the Part B program. The bill the House eventually passed, H.R. 4544, proposed to amend the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 [i.e., than those applicable under the HEW interim presumption.]

H.R. 4544, 95th Cong., 1st Sess. § 7 (1977).

A conference committee considered H.R. 4544 together with a Senate bill that sought to address the problems leading to the low approval rate by requiring the Secretary of Labor, to whom it granted rulemaking authority, to establish new "criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners." S. 1538, 95th Cong., 1st Sess. § 2 (1977). The conference committee's compromise effectuated the measures of both houses, but for different claims depending on their filing dates. The Senate measure was enacted as Section 402(f)(1)(D) and would govern claims filed *after* the effective date of the new regulations prescribed in the Section. 30 U.S.C. § 902(f)(1)(D).[10] The House measure was enacted as Section 402(f)(2) of the Act and governed all claims filed *before* the effective date of the new regulations, including all pending claims as well as all previously denied claims which were to be reopened. 30 U.S.C. §§ 902(f)(2), 945.[11]

The DOL promulgated its own interim presumption at § 727.203, 43 Fed. Reg. 36818 (1978), as its response to the Act's mandate at Section 402(f)(2) to adjudicate claims under "criteria . . . not . . . more restrictive than the criteria applicable to a claim" adjudicated under the HEW interim presumption. 30 U.S.C. § 902(f)(2). The DOL interim presumption contains

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[10] These new regulations were eventually promulgated at 20 C.F.R. Part 718, effective March 31, 1980. 45 Fed. Reg. 13678 (1980).

[11] In 1978, Congress also created the Black Lung Disability Trust Fund. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978). This fund is responsible for all claims (1) when the last mine employment was prior to January 1, 1970, (2) when the claims were denied prior to the 1978 amendments but were granted after review under those amendments, or (3) when a responsible coal mine operator cannot be found. 30 U.S.C. § 932(j).

some criteria that are not more restrictive than those of the HEW interim presumption.[12] However, with respect to miners able to prove they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence), the DOL presumption is more restrictive than the HEW presumption. Under the DOL interim regulation, such miners trigger the presumption only by proving that they worked in the coal mines for at least ten years. § 727.203(a)(1). In contrast, under the HEW interim regulation, such miners trigger the presumption *either* by proving at least ten years of coal mining experience, § 410.490(b)(2) (incorporating §§ 410.416(a) and 410.456(a)), *or* by proving that their pneumoconiosis arose out of coal mine work. § 410.490(b)(2) (incorporating §§ 410.416(b) and 410.456(b)). Thus, the DOL interim regulation fails to give claimants the option that the HEW interim regulation affords them—the ability to invoke a presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment. Claimants unable to trigger the presumption under the DOL regulation, even if they might have invoked the presumption under the HEW interim regulation, are forced to proceed under the strict permanent regulations. § 727.203(d).[13]

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[12] Indeed, the DOL presumption is less restrictive to miners than the HEW presumption in a few respects. For example, the HEW presumption may be triggered only by an x-ray, biopsy, autopsy, or set of ventilatory studies meeting specified requirements. § 410.490(b)(1). The DOL presumption may be triggered by any of those types of evidence and also by any of three other types of evidence meeting specified requirements—a set of blood gas studies, a physician's opinion, and, where the miner is deceased, a lay affidavit of his physical condition before death. § 727.203(a).

[13] The permanent regulations under which such claimants are forced to proceed are those set out at 20 C.F.R. Part 718 "as amended from time to time." § 727.203(d). When the "new" permanent regulations at Part 718 became effective on March 31, 1980, 45 Fed. Reg. 13678 (1980), respondents Broyles' and Colley's claims were awaiting administrative hearings. Accordingly, the Secretary should have applied these regulations to their claims instead of the permanent

C. This Litigation

Charlie Broyles and Bill Colley were among the many miners whose claims the Secretary denied by applying only the strict permanent regulations to their claims after finding that they worked less than ten years in the mines. (B. App. 8a, 20a)[14] And, like other such miners, the evidence they introduced would have been sufficient to invoke a presumption of eligibility under "criteria . . . not . . . more restrictive than the criteria applicable" under the HEW interim regulation.[15] Invoking the presumption would have shifted the burden to the Secretary for rebuttal. §§ 410.490(b), 410.490(c). In contrast, under the permanent regulations, which the Secretary applied to their claims, respondents Broyles and Colley bore the burden of

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Part 410 regulations. *Strike* v. *Director, O.W.C.P.*, 817 F.2d 395, 406 and n. 9 (7th Cir. 1987). However, this error is irrelevant in the current posture of the cases because the Part 718 regulations, like the permanent Part 410 regulations, contain no presumption of "total disability" that is applicable to any miners with less than ten years of coal mine experience.

[14] Our fellow black lung respondents in Nos. 87-821 and 87-827 represent a proposed class of miners whose claims were denied for the same reason but are no longer pending. In addition to the Secretary, the petitioners in these two cases include four coal companies and two insurance companies (the "private petitioners"). We refer to their brief here as "Priv. Br."

[15] In Mr. Broyles' case, the administrative law judge found both that he had pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. (B. App. 15a-16a) These findings satisfy §§ 410.490(b)(1)(i) and 410.490(b)(2), respectively, and therefore would invoke the HEW interim presumption as a matter of law.

The evidence in Mr. Colley's case is also sufficient to invoke the HEW interim presumption. A board-certified radiologist read the more recent of two x-rays positive for pneumoconiosis (B. App. 25a); and the report of the physician who examined Mr. Colley most recently concluded that his pneumoconiosis arose out of coal mine employment. (*Id.* at 27a)

proving affirmatively that they were "totally disabled" and that such disability arose out of coal mine employment (i.e., disability causation). §§ 410.422-410.426.

The claimants took separate appeals from the final administrative decisions denying them benefits. The Fourth Circuit, after consolidating the two cases, reversed each of the Benefits Review Board's decisions on the ground that the "ALJ erred in failing to evaluate the claims under the [HEW interim presumption]." (*Id.* at 2a) The court concluded that Section 402(f)(2) of the Act offered a "clear mandate" for application of the "liberal [HEW] interim presumption" to the claims before it. (*Id.* at 5a) It rejected the Secretary's argument that she need apply to these claims only "medical criteria" not more restrictive than those in the HEW interim presumption. (*Id.*)[16] The Secretary's petition for rehearing *en banc* was denied. (B. App. 29a)

SUMMARY OF ARGUMENT

A. In Section 402(f)(2) of the Act, Congress required the Secretary of Labor to adjudicate certain claims, including those of respondents Broyles and Colley, using eligibility criteria "not . . . more restrictive than the criteria applicable to a claim" under the HEW interim regulation. The black lung claimants interpret that mandate to require the Secretary to apply to their claims *all* criteria that in combination establish "total disability" under the HEW interim regulation. They submit that the DOL interim presumption, which is the Secretary of Labor's response to Section 402(f)(2), is not faithful to the Section's mandate because it deprives black lung claimants who can prove they have pneumoconiosis (by x-ray, biopsy, or

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[16] Unlike the Eighth Circuit in Nos. 87-821 and 87-827, the Fourth Circuit had no occasion to address any remedial question involving the applicability of its ruling respecting Section 402(f)(2) of the Act to a class of claimants. For this reason, respondents Broyles and Colley address only the substantive Section 402(f)(2) issue in this brief, and not the related remedial issues presented in Nos. 87-821 and 87-827.

autopsy evidence), § 410.490(b)(1)(i), of a right that the HEW interim presumption affords them—the ability to trigger a presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416(b), 410.456(b)). The Secretary proffers an erroneous interpretation of the statute under which the term "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). In her view, Section 402(f)(2) required her only to apply "all appropriate medical tests" of the HEW interim presumption, and the DOL interim presumption does that. The private petitioners make similar erroneous contentions.

B. Section 402(f)(2) does not use the word "medical" (or any variant of "medical") to modify the term "criteria." This fact refutes the position of the Secretary and the private petitioners that Congress was referring only to "medical tests" or "medical criteria" and thereby provides strong textual support for the black lung claimants' interpretation of the statute. So does the preceding provision, Section 402(f)(1)(D), in which Congress did modify the term "criteria" by following it with the restrictive clause "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." 30 U.S.C. § 902(f)(1)(D). That textual dichotomy is pivotal, for "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted). The reason that Congress would not have used the word "criteria" in Section 402(f)(2) to mean the same thing as the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) is that the two sections have entirely different functions under the statute. Moreover, the Act is replete with express cross-references from one section to another, a drafting pattern that contradicts the Secretary's notion that Section 402(f)(2) implicitly refers to Section 402(f)(1)(D).

C.1. The completely independent legislative lineages of Sections 402(f)(1)(D) and 402(f)(2) establish that Congress never intended the latter provision to refer to the former.

2. The legislative history includes statements about the measures that became Section 402(f)(2) in which the speakers used the word "medical" to modify the word "criteria," "standards," or "regulations." Although the Secretary and the private petitioners contend that such references support their position, they do not. Legislators and others used these words as terms-of-art to mean all criteria necessary to prove eligibility, not merely criteria that are strictly medical. Moreover, the legislative history includes other statements about the same measures in which the speakers used the word "criteria" or "standards" without any modification at all. Because these references, by their terms, do not limit the ambit of the term "criteria" to medical criteria, they support the black lung claimants' position. In any event, the respect in which the DOL interim presumption is more restrictive than the HEW interim presumption—proof that the miner's pneumoconiosis arose out of coal mine employment—*is* a "medical criterion."

3. Although the HEW interim regulation enabled miners with less than ten years mining experience to trigger the presumption of disability, the Secretary says that evidence presented before enactment of the 1978 amendments persuaded Congress that miners with less than ten years of mining experience rarely contract black lung disease. This argument is wholly insubstantial for several reasons, including the fact that the only evidence from the legislative history on which the Secretary relies contradicts her position.

D. The clarity of the statutory language and the support the legislative history lends claimants' interpretation of Section 402(f)(2) make deference to the Secretary's interpretation of the statute inappropriate. Furthermore, Congress expected that in interpreting the 1978 amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner."

S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). This directive, to which the Department of Labor has bound itself, § 718.3(c), requires the Secretary to adopt the black lung claimants' reasonable interpretation of the statute.

E. The private petitioners' contention that a court is without authority to direct the Secretary to apply the HEW interim presumption because she has never published it in accordance with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (the "APA"), is meritless. With respect to the claims subject to Section 402(f)(2), the HEW interim presumption is not a "rule" at all. Rather, because Congress incorporated it in Section 402(f)(2), it gained the force and effect of a statute, which is not subject to the rulemaking provisions of the APA. 5 U.S.C. §§ 551(1)(A), 551(4).

ARGUMENT

THE DOL INTERIM PRESUMPTION FAILS TO IMPLEMENT THE MANDATE OF SECTION 402(f)(2) OF THE ACT, AND TO ENFORCE THAT MANDATE A COURT MAY DIRECT THE SECRETARY OF LABOR TO APPLY THE HEW INTERIM PRESUMPTION

The question in this case is whether the DOL interim presumption at 20 C.F.R. § 727.203 is faithful to Section 402(f)(2) of the Act. Four of the five courts of appeals to have addressed the question and the respondent black lung claimants say it is not; the Secretary of Labor and the private petitioners say it is. The resolution of the controversy turns on the meaning of Section 402(f)(2), which provides that "[c]riteria applied by the Secretary of Labor in [certain claims] . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2).

The terms of the debate are by now well defined. All parties agree that the class of claims to which Section 402(f)(2) applies are the claims pending or to be reopened under Section 435 of the Act, 30 U.S.C. § 945, as well as the "new" claims filed before the Secretary promulgated new permanent eligibility regulations pursuant to Section 402(f)(1). Secy. Br. at 7; Priv. Br. at 21. All parties also agree that the phrase in Section 402(f)(2) beginning "not . . . more restrictive" means that the "criteria" the Secretary is to apply must be at least as favorable to the individual black lung claimant as the "criteria" of the HEW interim presumption at § 410.490. Secy. Br. at 7, 17-18; Priv. Br. at 22. In this context, the dispute between the black lung claimants, on the one hand, and the combined forces of the Secretary of Labor and the coal and insurance industries, on the other, has centered on *which* "criteria" Congress was referring to in Section 402(f)(2).[17] *See Broyles* v. *Director, O.W.C.P.*, 824 F.2d 327, 329-30 (4th Cir. 1987); *Kyle* v. *Director, O.W.C.P.*, 819 F.2d 139, 142-43 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3463, 3484 (U.S. Jan. 12, 19, 1988) (Nos. 87-1045, 87-1065); *Strike* v. *Director, O.W.C.P.*, 817 F.2d 395, 400 (7th Cir. 1987); *Coughlan* v. *Director, O.W.C.P.*, 757 F.2d 966, 968 (8th Cir. 1985); *Halon* v. *Director, O.W.C.P.*, 713 F.2d 21, 24 (3d Cir. 1983) ("*Halon II*"), *reinstating* 713 F.2d 30, 31 (3d Cir. 1982) ("*Halon I*").

The Secretary's current position is that the "criteria" referred to in Section 402(f)(2) are "all appropriate medical tests" in the HEW interim presumption. Secy. Br. at 15, 22.[18]

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[17] The Secretary misframes the inquiry when she initially suggests that the dispute among the parties concerns the meaning of the word "criteria" itself. Secy. Br. at 17 and n. 15. She accentuates the misfocus by concluding that the term is ambiguous. *Id.* The word "criteria" is not ambiguous. While Congress did not define it in the statute, Congress is assumed to use words in their ordinary way. *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The ordinary meaning of "criteria" is the one the Secretary ascribes to it: a "standard on which a judgment or decision is based." Secy. Br. at 17 n. 15 (citing *Webster's New Collegiate Dictionary* 307 (1983)). Using the Secretary's definition, the question here may properly be understood as asking what were the particular "standards" Congress had in mind in Section 402(f)(2), not what the term "standard" means.

[18] The Secretary also frequently asserts that the term "criteria" in Section 402(f)(2) refers to the "medical criteria" in the HEW pre-

The private petitioners' position is that the "criteria" referred to in Section 402(f)(2) of the Act are "the medical bases for invocation [of the HEW interim presumption.]" Priv. Br. at 22. The black lung claimants' understanding of the statute is that the "criteria" referred to in Section 402(f)(2) are *all* the criteria in the HEW interim presumption that in combination establish "total disability."

The claimants' understanding of the statute is correct. The language of Section 402(f)(2), *see* § B *infra*, and its legislative history, *see* § C *infra*, each require that conclusion. While the Secretary and the private petitioners appeal to the deference ordinarily paid to the Secretary's construction of the Act, no such deference is owing here. *See* § D *infra*.

A. The DOL Interim Presumption Is More Restrictive Than The HEW Interim Presumption With Respect To A "Total Disability" Criterion

The DOL and HEW interim presumptions both offer the black lung claimant a means of establishing that he is "totally disabled [because] pneumoconiosis prevents him or her from engaging in [his or her usual coal mine work or comparable work]." 30 U.S.C. § 902(f)(1)(A); *see also* §§ 410.490(b), 727.203(a). However, the DOL presumption is more restrictive (i.e., is less favorable to claimants) than the HEW presumption. Specifically, to trigger the DOL presumption, claimants able to prove that they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence) must also prove that they worked in the coal mines for at least ten years. § 727.203(a). In contrast, to

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sumption (Secy. Br. at 14, 17-18, 19, 22 n. 18, 27), a category of criteria which, at least in common parlance, is broader than "medical tests." She uses shifting formulations of her position on the key question in this case because the support she says she finds in the words of the statute bears only on her "medical test" formulation, *see* pp. 22-26 *infra*, while the primary support she says she finds in the legislative history bears instead only on her broader "medical criteria" formulation. *See* pp. 32-39 *infra*.

trigger the HEW presumption, claimants able to prove that they have pneumoconiosis (also by x-ray, biopsy, or autopsy evidence) have a choice: they may prove *either* that they worked in the coal mines for at least ten years, § 410.490(b)(2) (incorporating §§ 410.416(a) and 410.456(a)), *or* that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416(b) and 410.456(b)). Because the DOL interim regulation deprives claimants of the ability to trigger the presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment [hereinafter "proof of disease causation"], that regulation is less favorable to claimants than the HEW interim regulation.[19] Both the Secretary and the private petitioners concede this.

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[19] The Secretary and the private petitioners call the criterion that renders the DOL presumption less favorable to claimants than the HEW presumption the "ten year coal mining requirement" of the DOL presumption. Secy. Br. at 14, 15, 18, 23, 24 n. 19; Priv. Br. at 18, 27 and n. 36, 29. This characterization is inaccurate. As noted in the text, *both* the DOL and the HEW interim regulations allow those claimants able to prove pneumoconiosis (by x-ray, biopsy, or autopsy evidence) to trigger a presumption of "total disability" by proving that they worked in the mines for at least ten years. But the decisive fact is that the HEW regulation provides claimants with an *additional* option for invoking the same presumption that the DOL regulation does not provide—proving that their pneumoconiosis arose out of coal mine employment. The DOL presumption is therefore "more restrictive" than the HEW presumption with respect to the proof of disease causation criterion, not the ten-year coal mining criterion.

The erroneous characterization that the Secretary and private petitioners proffer should not be allowed to deflect attention from the fact that the actual respect in which the DOL presumption is "more restrictive" than the HEW presumption— proof of disease causation —is a "medical criterion." This fact defeats the private petitioners' interpretation of Section 402(f)(2) on its own terms. *See* pp. 37-39 *infra*.

Secy. Br. at 8, 11; Priv. Br. at 11-12.[20]

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[20] The private petitioners point out that the HEW presumption on its face contains only two rebuttal methods by which a claim can be defeated (§§ 410.490(c)(1) and 410.490(c)(2)), whereas the DOL presumption contains not only these same rebuttal methods (§§ 727.203(b)(1), 727.203(b)(2)) but also two additional rebuttal methods (§§ 727.203(b)(3), 727.203(b)(4)). Priv. Br. at 12-13. They therefore conclude that these additional rebuttal methods—which allow them to defeat a claim by showing that the miner's disability did not arise out of coal mine employment or that he does not have pneumoconiosis—are additional respects in which the DOL presumption is less favorable to claimants than the HEW presumption. *Id.* They nevertheless maintain that the DOL presumption complies with the Act. *Id.* at 19-30. The Secretary, however, says that she "does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive," Secy. Br. at 26 n. 21, and that application of the additional rebuttal methods of the DOL presumption is required by the "command" of Section 413(b) of the Act, 30 U.S.C. § 923(b), that "all relevant evidence shall be considered." Secy. Br. at 26-27.

The black lung claimants agree with the Secretary's position in this respect, especially because the conference committee report on the bill that enacted the 1978 amendments ties this directive of Section 413(b) directly to Section 402(f)(2). H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (for claims subject to Section 402(f)(2) of the Act, the Secretary "shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that* in determining claims under such criteria *all relevant medical evidence shall be considered*" (emphasis added)); *see also* 30 U.S.C. § 901(a) (describing the elements of a claim, which include proof of pneumoconiosis and disability causation). The Sixth Circuit has apparently adopted this rationale in requiring application of all the rebuttal methods of the DOL interim regulation in cases to which the favorable invocation criterion of the HEW interim regulation must be applied. *Warman* v. *Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n. 1 (6th Cir. 1988) (relying on *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985), which held that the "all relevant medical evidence" exception in the conference committee report demonstrates Congress' intent to allow more restrictive rebuttal of the interim presumption in Part C cases than in Part B cases, *id.* at 489-90); *see also Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n. 2 (6th Cir. 1987). No other circuit has considered whether the Act allows the Secretary to apply the rebuttal provisions of the DOL interim regulation to claims in which she must apply the invocation provisions of the HEW interim regulation. Contrary to the private petitioners' contention (Priv. Br. at 15), this issue was not addressed below or in *Sulyma* v. *Director, O.W.C.P.*, 827 F.2d 922 (3d Cir. 1987).

The Secretary and the private petitioners also contend that if the Act were read to deny coal operators the ability to defeat a claim using the additional rebuttal methods of the DOL interim presumption, the Act would violate the due process clause of the fifth amendment. Secy. Br. at 26-27; Priv. Br. at 30-34. There is no occasion to consider this question, which was not presented below or in the petitions for certiorari. For, as explained in this note, the black lung claimants agree with the Secretary that the Act does authorize her to apply the additional rebuttal methods of the DOL interim presumption in cases to which the HEW interim presumption must be applied.

Moreover, the HEW presumption makes proof of disease causation a criterion for establishing "total disability," the subject of Section 402(f)(2). The claimant triggers a presumption of "total disability" under the HEW presumption only by satisfying a *combination* of criteria—as relevant here, proof of pneumoconiosis (through x-ray, biopsy, or autopsy evidence) combined with proof of disease causation. Put differently, for the black lung claimants here, proof of disease causation is a *sine qua non* of access to the presumption of "total disability" under the HEW presumption; and without access to a presumption of "total disability," claimants are consigned to the so-called permanent regulations, all versions of which have always provided extremely rigorous criteria for proving "total disability" affirmatively. *See* §§ 410.424-410.426, 718.204.[21] Thus,

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[21] The approval rates have always been much higher for classes of claims to which the DOL or the HEW interim presumption has been applicable than for classes of claims to which only a version of the permanent regulations has been applicable. Solomons, n. 9 *supra* at 873; Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 694-95 (1983); *see also* n. 9 *supra*.

the HEW interim presumption ascribes a significance to proof of disease causation that goes beyond the issue of disease causation itself; access to a presumption of "total disability" is dependent on proof of disease causation.[22] The Secretary and the private petitioners are therefore wrong in contending that "total disability" and disease causation are separate issues. Secy. Br. at 18; Priv. Br. at 27 n. 36.

In sum, both the Secretary and the private petitioners acknowledge that the DOL presumption is more restrictive to claimants than the HEW presumption. Moreover, the respect in which the DOL presumption is more restrictive than the HEW presumption is a "total disability" criterion. Thus, in order to avoid Section 402(f)(2)'s mandate, the Secretary and the private petitioners must proffer constructions of Section 402(f)(2) that would exclude from its ambit a particular "criterion" that they acknowledge does make the DOL presumption "more restrictive" than the HEW presumption. The particular construction of Section 402(f)(2) they do advance forces claimants to proceed under the more rigorous permanent regulations. This result is difficult to square with the fact that Congress enacted Section 402(f)(2) precisely to correct "Labor's low claims approval rate" under the permanent regulations. *Mullins*, 108 S. Ct. at 437. The Secretary's interpretation appears to continue the "pattern of unduly strict administration of benefits" that has plagued the black lung benefits program since it began. *Echo* v. *Director, O.W.C.P.*, 744 F.2d 327, 330 (3d Cir. 1984).

[22] Separate from the operation of the HEW interim presumption, the statutory definition of "total disability" at Section 402 (f) encompasses proof of disease causation. Section 402(f)(1)(A) provides that a miner unable to perform his former coal mine work is "totally disabled" only when "pneumoconiosis" is responsible for his impairment. 30 U.S.C. § 902(f)(1)(A). And the term "pneumoconiosis" in Section 402(f)(1)(A) is itself a term whose statutory definition encompasses only diseases caused by coal mine employment. 30 U.S.C. § 902(b). Accordingly, as an element of the statutory definition of "pneumoconiosis," which is itself an element of the statutory definition of "total disability," proof of disease causation is essential to proof of "total disability."

B. The Plain Language Of Section 402(f)(2) Prohibits The Secretary From Applying Any "Total Disability" Criteria—Whether Non-Medical Criteria, Medical Tests, Or Other Medical Criteria—That Are More Restrictive Than Those Of The HEW Interim Presumption

There is "no more persuasive evidence" of Congress' intent in enacting a statute than the "words by which [it] undertook to give expression to its wishes." *United States* v. *American Trucking Assoc'ns, Inc.*, 310 U.S. 534, 543 (1940). Nonetheless, the Secretary and the private petitioners studiously avoid grappling with the language of the Act in any significant way. Secy. Br. at 17-18; Priv. Br. at 21-22 and n. 31. The language of the statute deserves much more attention than they give it. *See Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

As noted above, the Secretary and the private petitioners contend that Congress used the word "criteria" in Section 402(f)(2) to refer only to "medical tests" or "medical criteria." But Section 402(f)(2) does not use the word "medical" (or any variant of "medical") at all. The limitation that petitioners seek to impose on the "criteria" to which Section 402(f)(2) refers is therefore one that finds no support in the words of that provision itself. In contrast, that the term "criteria" is not limited in any way in the Section provides strong textual support for the black lung claimants' interpretation.

Moreover, considering that Section 402(f)(2) is part of the statutory definition of "total disability" in Section 402(f), the most natural reading is that the term "criteria" refers to all criteria that in combination establish such disability, including non-medical criteria as well as medical tests and other medical criteria. To conclude that the word "criteria" in Section 402(f)(2) refers only to some of the criteria germane to "total

disability" divorces the word "criteria" from its statutory anchor.

The meaning of the word "criteria" in Section 402(f)(2) is also informed by the two preceding provisions: Sections 402(f)(1)(C) and 402(f)(1)(D). Section 402(f)(1)(C) requires that the "regulations [defining 'total disability'] shall not provide more restrictive *criteria* than those applicable under [the definition of disability for the social security disability program at] section 423(d) of Title 42." 30 U.S.C. § 902(f)(1)(C) (emphasis added). As in Section 402(f)(2), Congress did not modify the term "criteria" in Section 402(f)(1)(C). In Section 402(f)(1)(D), on the other hand, Congress did modify the term "criteria" by following it with the restrictive clause "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." 30 U.S.C. § 902(f)(1)(D). Thus, twice, in Sections 402(f)(1)(C) and 402(f)(2), Congress *did not* expressly modify the term "criteria," but in Section 402(f)(1)(D), Congress *did* modify the term with a restrictive clause. That textual dichotomy is pivotal. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted).

This principle of statutory construction repudiates what meager support the Secretary and the private petitioners try to draw from the face of the statute. The Secretary states that the word "criteria" in Section 402(f)(2) is "shorthand for the phrase 'criteria for all appropriate medical tests' [in Section 402(f)(1)(D)]." Secy. Br. at 15. The private petitioners do not see such a direct linkage but suggest that since the word "criteria" in Section 402(f)(1)(D) "directly relates to 'criteria for . . . medical tests,'" the word "criteria" in Section 402(f)(2) implies a "reference to medical data or medical standards only." Priv. Br. at 21 n. 31. These interpretations contradict the principle of *Russello* because they proceed from the illogical

assumption that the different language Congress used in the two sections should be accorded a single meaning. The interpretation of the black lung claimants, on the other hand, honors the *Russello* principle because it proceeds from the common sense understanding that when Congress used different words it meant to say different things.[23]

Congress used different words to say different things in Sections 402(f)(2) and 402(f)(1)(D) because the two sections have entirely different functions. One of the respects in which the Secretary's reliance on Section 402(f)(1)(D) is textually selective is that she ignores the language that defines the distinctive function of that Section. The Secretary's position draws on Section 402(f)(1)(D) only for the phrase "criteria for all appropriate medical tests," but the Section actually requires the Secretary to establish "criteria for all appropriate medical tests . . . *which accurately reflect total disability in coal miners*." 30 U.S.C. § 902(f)(1)(D) (emphasis added). The language of this Section that the Secretary discards demonstrates that the function of the Section was to mandate the creation of medical test standards that, *independently of any other criteria*, would establish whether a miner is disabled.

In contrast, the standards for the medical tests common to the DOL and HEW interim presumptions (x-rays and ventilatory studies) were never designed to "accurately reflect total disability in coal miners." Rather, under the interim presumptions these medical tests are devices that, *in combination with the other invocation criteria*, serve to shift the burden to the opposing party to disprove the miners' disability. *See*

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[23] While the Sixth Circuit in *Kyle* expressly relied on the *Russello* principle in adopting the construction of Section 402(f)(2) that the black lung claimants advance, *Kyle*, 819 F.2d at 143, the Seventh Circuit failed even to consider that principle when, in *Strike*, it became the only court to accept the Secretary's proffered interpretation. *Strike*, 817 F.2d at 401.

Mullins, 108 S. Ct. at 435-38 and nn. 26, 28.[24] Because claims subject to Section 402(f)(2) must be evaluated by "criteria" that are "not . . . more restrictive than the criteria applicable to a claim" adjudicated under the HEW interim presumption, establishing the disability of miners in Section 402(f)(2) claims requires consideration of the interim presumption medical test standards in conjunction with other criteria.

In sum, the functions of Sections 402(f)(1)(D) and 402(f)(2) are entirely different. Section 402(f)(1)(D) mandates the creation of "medical test" standards that, independently of other criteria, *would establish* whether a miner is disabled once the regulations incorporating the medical test standards were eventually published sometime after enactment of the 1978 amendments to the Act. *See* 20 C.F.R. Part 718 (1981). On the other hand, Section 402(f)(2) requires that the claims subject to the Section be adjudicated using "criteria" that existed before June 30, 1973, including medical test standards that *do not establish* whether a miner is disabled *except* in conjunction with other "criteria." In view of the different functions of Sections 402(f)(1)(D) and 402(f)(2), it is hardly likely that Congress would have used the word "criteria" in the latter section to mean the same thing as the words "criteria for all appropriate medical tests" in the former section. *See also* § C.1 *infra* (discussing the independent legislative lineages of Sections 402(f)(1)(D) and 402(f)(2)).

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[24] When the private petitioners repeatedly criticize the HEW interim regulation because its medical test standards do not accurately determine disability (Priv. Br. at 8-9, 23, 31-32), they exhibit their misunderstanding of the operation of that regulation. Whether or not a miner is disabled is ultimately determined using the various rebuttal methods, not using the medical test requirements set forth in the invocation provisions of the regulation. The medical tests for invocation are only presumptive burden-shifting devices. The various rebuttal methods come into operation after the presumption has been triggered under the invocation criteria.

The Secretary's reliance on Section 402(f)(1)(D) is textually selective in another respect that further demonstrates the weakness of her position. While the Secretary contends that Section 402(f)(2) is linked to Section 402(f)(1)(D), she ignores Section 402(f)(1)(C) entirely. But, as noted above, in both Sections 402(f)(1)(C) and 402(f)(2), Congress used the word "criteria" without modification, whereas in Section 402(f)(1)(D) Congress did modify the word "criteria." Moreover, Sections 402(f)(1)(C) and 402(f)(2) both include a "not . . . more restrictive" mandate, while Section 402(f)(1)(D) does not. Accordingly, if Section 402(f)(2) is linked to any prior provision, that provision would be Section 402(f)(1)(C), in which the term "criteria" clearly refers to both medical and non-medical standards. 30 U.S.C. § 902(f)(1)(C) (requiring application of criteria not more restrictive than those applicable under 42 U.S.C. § 423(d), which defines disability in terms of whether a claimant's "impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, *considering his age, education, and work experience*, engage in any other kind of substantial gainful work" (emphasis added)).[25]

Furthermore, if Congress used "shorthand" in Section 402(f)(2) to refer to Section 402(f)(1)(D), then it used a style of draftsmanship it consistently disavowed elsewhere in the statute. The Act, including the 1978 amendments, is replete with express cross-references from one section to another. *E.g.*, 30

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[25] The private petitioners, citing 20 C.F.R. §§ 404.1511(a) and 404.1525, say that "SSA rules employ the term 'criteria' to mean medical guides for total disability." Priv. Br. at 21 n. 31. On that basis, they conclude that Congress must also have understood the term "criteria" in Section 402(f)(1)(C) to refer to "medical data or medical standards only." *Id.* This conclusion is incorrect because the SSA disability program rules, including eligibility rules, also frequently use the word "criteria" to refer to standards other than medical standards. *E.g.*, 20 C.F.R. §§ 404.463(a), 404.1567(a), 404.1569, 404.1574(b), 404.1599(d), 416.121(d), 416.520(b)(4), 416.537(b), 416.553, 416.1161a(b)(2), 416.1202(a), 416.1203, 416.1262.

U.S.C. §§ 902(i); 921(b), (c)(4), (c)(5); 922(a)(3), (a)(4), (a)(5), (b); 923(d); 924(a)(2). Indeed, Section 402(f)(2) itself refers to Section 435; and Section 402(f)(1)(D) refers to Section 402(f)(1)(A). When Congress wanted to subject one statutory provision to another, or require the Secretary to interpret one provision in light of another, it did so expressly, by telling the Secretary in the statute the specific provision it had in mind. This drafting pattern contradicts the Secretary's notion that Section 402(f)(2) implicitly refers to Section 402(f)(1)(D).

Finally, the Secretary also tries to derive support from the fact that Section 402(f)(2) is part of the statutory definition of "total disability" at Section 402(f). She says that "[i]f Congress had intended to require Labor to apply HEW's interim presumption in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision." Secy. Br. at 18.[26] This theory is wrong because it ignores the close relationship between the HEW presumption and the statutory definition of "total disability" at Section 402(f). Section 402(f) has always defined "total disability," and the HEW presumption implemented that definition by enumerating the combinations of criteria—medical tests, other medical criteria, and non-medical criteria—necessary to establish a presumption of "total disability." Both the HEW presumption and Section 402(f) of the Act focus on the facts that must be proven *in order to* establish "total disability." In contrast, the fifteen-year statutory presumption, 30 U.S.C. § 921(c)(4), focuses only on the other facts that are established if a claimant *has already* proven a disabling impairment. Accordingly, when Congress chose to make the HEW presumption a statutory standard, amending the definition of "total disability" at Section 402(f) was the logical way to do so.

[26] Section 411(c)(4), 30 U.S.C. § 921(c)(4), provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not . . . have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

C. The Legislative History Of Section 402(f) Supports The Black Lung Claimants' Interpretation Of The Statute

Because the language of Section 402(f) is clear, any consideration of its legislative history should be limited to determining whether there is "clearly expressed legislative intention" contrary to the statutory language sufficient to call into question the "strong presumption that Congress expresses its intent through the language it chooses." *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n. 12 (1987). In any event, the legislative history supports the black lung claimants' interpretation of the statute here.

1. The Completely Independent Legislative Lineages Of Sections 402(f)(1)(D) And 402(f)(2) Establish That Congress Never Intended The Latter Provision To Refer To The Former

The Secretary argues that Congress intended the term "criteria" in Section 402(f)(2) to refer to the phrase "criteria for all appropriate medical tests" in the preceding provision, Section 402(f)(1)(D). As do the words of the statute, the legislative history decisively refutes this argument. Although both provisions were added to the Act by the 1978 amendments, their completely independent legislative lineages make it clear that Congress did not intend Section 402(f)(2) to refer to Section 402(f)(1)(D).

The 1978 amendments were the product of a conference bill, H.R. 4544, 95th Cong., 2d Sess. (1978). The bill the Senate passed, S. 1538, proposed to amend the statutory definition of "total disability" to provide:

> [The] Secretary [of Labor], in consultation with the Director of the National Institute for Occupational Safety and Health [NIOSH], shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners. . . .

S. 1538, 95th Cong., 1st Sess. § 2 (1977). This language was virtually identical to that which became Section 402(f)(1)(D) of the Act. When promulgated, the new medical test criteria the bill prescribed were to be applied to claims then pending and thereafter filed, but not to claims previously adjudicated. S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977). But that bill contained no provision like the one that became Section 402(f)(2) of the Act.

The bill the House passed, H.R. 4544, proposed to amend the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973.

H. R. 4544, 95th Cong., 1st Sess. § 7 (1977).[27] Section 12 of

[27] Section 7 of H.R. 4544 originated with a proposal by the United Mine Workers ("UMW"). It urged Congress to amend the Act by adding a provision reading:

> The standards for determining whether a miner who filed a claim after July 1, 1973 is totally disabled due to pneumoconiosis shall not be more restrictive than the standards prescribed by the Secretary [of HEW] for evaluating claims filed prior to July 1, 1973.

Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st & 2d Sess. 349 (1973-1974) [hereinafter *1974 Hearings*]. Arnold Miller, President of the UMW, explained the intent of the Union's proposal when he presented testimony urging that the "interim standards established by the 1972 amendments . . . become the permanent standards used . . . in processing black lung claims." *Id.* at 117. The legislative history contains no hint that the Union understood its proposal as one that would require only the application of the interim "medical test" standards or "medical criteria" to black lung claims. The intent of the UMW was obviously to secure for its members the benefit of all the interim presumption eligibility standards, which were decidely more liberal than those of the permanent regulations. *See* pp. 5-6 and nn. 9, 21 *supra*.

H.R. 4544 also provided that the "not . . . more restrictive" mandate would govern the adjudication of all pending claims and the readjudication of all claims previously denied. While the relevant language of Section 7 of the bill was virtually identical to that which became Section 402(f)(2) of the Act, the bill contained no provision even remotely similar to that which became Section 402(f)(1)(D). Thus, the bill contained no phrase like "criteria for all appropriate medical tests" to which the word "criteria" in Section 7 of the bill could have referred.[28]

The conference bill brought together the provisions that became Sections 402(f)(2) and 402(f)(1)(D). H.R. 4544, 95th Cong., 2d Sess. § 2 (1978). But it did so in order to effectuate the conference committee's straightforward trade, the terms of which are apparent on the face of the statute. Both houses of Congress got exactly what they wanted, but for different claims depending on their filing dates. Section 402(f)(1)(D) embodied the Senate's approach, which prevailed as to claims filed after the Secretary promulgated new permanent regula-

[28] Five other bills were introduced in the House before H.R. 4544. The first three, like H.R. 4544, included the provision that became Section 402(f)(2) of the Act but not the provision that became Section 402(f)(1)(D). H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 3333, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong., 1st Sess. § 7 (1975). The other two bills did include both provisions, but in each bill the provision that became Section 402(f)(2) of the Act *preceded* the provision that became Section 402(f)(1)(D). H.R. 1532, 95th Cong., 1st Sess. § 2 (1977); H.R. 4389, 95th Cong., 1st Sess. § 2 (1977). This order belies any conclusion that the word "criteria" in the provision that became Section 402(f)(2) ever referred to the phrase "criteria for all appropriate medical tests" in the provision that became Section 402(f)(1)(D).

tions including the new "medical test" criteria prescribed by the Section. Section 402(f)(2) embodied the approach of the House, which prevailed for all claims previously denied, all claims then pending, and all claims filed until the Secretary of Labor promulgated new permanent regulations. While the conference bill had to bring the two provisions together in order to effectuate the committee's trade, nothing in the legislative history suggests that Congress brought the provisions together so that one of them could implicitly refer to the other.

2. The Statements In The Legislative History Using The Word "Criteria" Or The Like Support The Black Lung Claimants' Interpretation Of Section 402(f)(2)

a. The Numerous References In Which The Word "Criteria" Or "Standards" Is Used Without Modification Support The Claimants' Interpretation

The legislative history includes statements about the measures that became Section 402(f)(2) in which the speakers used the word "medical" to modify the word "criteria," "standards," or "regulations." Secy. Br. at 20-21 (citing statements); Priv. Br. at 23-25 (same). The Secretary and the private petitioners contend that such references support their position. *Id.* As discussed in § C.2.b *infra*, they do not. In any event, the legislative history includes other statements about the same measures in which the speakers used the word "criteria" or "standards" without any modification at all. Because these references, by their terms, do not limit the ambit of the term "criteria" to medical criteria, they support the black lung claimants' position that Congress did not intend any such limitation of the term "criteria" in Section 402(f)(2).

For example, in urging passage of the conference bill that was enacted, Representative Perkins stated:

> [A]ll of the denied and pending claims subject to review under the legislation will be evaluated according to the *"interim" standards* . . . . With respect to the review responsibility of the Secretary of HEW under the legislation, the *"interim" standards* remain solely applicable, as

> they have in the past under the HEW-part of the program. As for the Secretary of Labor's review responsibility thereunder, the *"interim" standards are exclusively and unalterably applicable with respect to every area they now address*, and may not be made or applied more restrictively than they were in the past. . . .

124 Cong. Rec. 3426 (1978) (emphasis added). These views are entitled to particular respect because Representative Perkins, the senior House member of the conference committee and the floor manager when the bill returned to the House after conference, was the sponsor of the language ultimately enacted as Section 402(f)(2). H. R. 4544, 95th Cong., 1st Sess. (1977). *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-27 (1982).

Representative Simon stated in the same floor debate that, with respect to the claims subject to the provision that became Section 402(f)(2), the Secretary of Labor could "not prescribe *criteria* more restrictive than the social security interim adjudicatory *standards*." 124 Cong. Rec. 3431 (1978) (emphasis added). Similarly, Representative Murphy stated that such claims "will be reviewed in light of all available medical evidence, under *standards* no more restrictive than the 'interim' *standards* issued by the Secretary of Health, Education and Welfare." *Id.* at 3900 (emphasis added). Representative Erlenborn was the leading congressional opponent of reform legislation favorable to black lung claimants. In debates on H.R. 10760, 94th Cong., 1st Sess. (1975), Section 7 of which contained a provision like the one that became Section 402(f)(2), Representative Erlenborn stated:

> Already, the General Accounting Office, in looking over the *criteria* used under Part B, said that the Social Security Administration is using *criteria* more generous and more liberal than the law allows, and this bill would take those *criteria* and establish them as the *criteria* for part C. . . ."

122 Cong. Rec. 4972 (1976) (emphasis added).

The legislative history offers numerous other statements in the same vein, including the statement in the conference com-

mittee's report that DOL must promulgate interim regulations which "shall not provide more restrictive *criteria* than those applicable to a claim [under the HEW interim presumption]." H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (emphasis added).[29] In their number and in the diversity and the authority of the speakers, these statements reinforce the black lung claimants' interpretation that the "criteria" encompassed by Section 402(f)(2) are all the criteria that in combination establish "total disability."

b. The References To "Medical Criteria" And The Like, On Which The Secretary And The Private Petitioners Rely, Actually Support The Claimants' Interpretation

The Secretary's and the private petitioners' reliance on references in the legislative history to "medical criteria" and the like

[29] *See, e.g., 1977 Benefits Provisions Hearings*, p. 7 *supra* at 165 (remarks of Rep. Perkins stating "[t]he coal operators . . . are objecting to the interim standards that are now applicable to Part B being applied to Part C"); *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 142 (1977) (testimony in which Asst. DOL Secretary Elisburg stated "[t]here is some difficulty, however, with the idea of simply adopting the interim standards for part C"); *id.* at 49 (testimony of Arnold Miller, President, United Mine Workers, stating "H.R. 4544, the black lung bill recently reported from the House Education and Labor Committee, provided that the standards for judging claims of miners who filed after June 30, 1973 should be no more restrictive than the standards used to evaluate the claim of a miner who applied on June 30, 1973"); *id.* at 28 (identical testimony of Bedford Bird, M.D., United Mine Workers official); *1974 Hearings*, n. 27 *supra* at 340 (statement of William Worthington, Chairman, Regional Black Lung Association, Coxton, Ky., stating "[s]tandards for miners who filed claims after July 1, 1973 should be no more restrictive than those in force prior to July 1, 1973"); *id.* at 366 (testimony of John Rosenberg, Director Appalachian Research and Defense Fund, stating "[u]nless the Department [of Labor] is instructed to adopt more liberal standards, the interim standards at a minimum, we will return to the early days . . . when in Kentucky, for example, two-thirds of the claims were rejected").

is misplaced. In fact, the references support the black lung claimants' interpretation of Section 402(f)(2).

i. The Secretary contends that the word "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical *tests*" in Section 402(f)(1)(D). Secy. Br. at 15, 22. If the legislative history did contain references suggesting that the word "criteria" in Section 402(f)(2) means "medical tests," they would offer some support for that contention. But the references in the legislative history to "medical *criteria*," "medical *standards*," and "medical *eligibility regulations*" do not offer such support because these categories are broader than "medical *tests*." In the black lung regulatory context, "medical tests" is a category that includes x-rays, ventilatory studies, and blood gas studies, whereas the broader categories of "medical criteria" and the like include not only these medical tests but also such other criteria as proof of disease causation (*see* pp. 37-39, *infra*) and proof of disability causation.[30]

[30] The Secretary cites isolated comments by three witnesses (a practicing attorney, an official of the United Mine Workers, and a minor official of the Department of Labor) to the effect that the differing ventilatory standards is the only respect in which the HEW interim presumption is more favorable to claimants than the HEW permanent regulations. Secy. Br. at 19-20. These comments do not help the Secretary. If Congress had considered these comments significant, the words "ventilatory study standards" would now appear in Section 402(f)(2) instead of the word "criteria." In any event, the HEW interim presumption is also more favorable to claimants than the HEW permanent regulations in respects other than the ventilatory study standards. Indeed, the claimants in this case, who do not rely on ventilatory studies at all, have litigated their claims so extensively precisely because *they* would be treated more favorably under the interim presumption than under the permanent regulations. Their x-ray evidence is sufficient to prove that they have pneumoconiosis, and they are also able to prove that their pneumoconiosis arose out of coal mine employment. Under the HEW interim presumption, they would automatically obtain a presumption that they are "totally disabled" without having to present any ventilatory studies or other evidence concerning the severity of their

ii. The private petitioners contend that the "criteria" to which Section 402(f)(2) refers are "the medical bases for invocation [of the HEW interim presumption]." Priv. Br. at 22. The words of the statute provide no support for this interpretation. Indeed, the private petitioners do not seriously contend otherwise. *See* Priv. Br. at 21-22 and n. 31. Consequently, they (and the Secretary, to the extent her shifting formulations include a similar interpretation, *see* n. 18 *supra*) rely heavily on the isolated references in the legislative history to "medical criteria" and the like. The private petitioners and the Secretary argue first that these references establish that the statutory directive requiring that "criteria . . . not be more restrictive" than the criteria in the HEW interim presumption applies only to "medical" criteria, as distinguished from "evidentiary" or "adjudicatory" criteria. Secy. Br. at 17-22; Priv. Br. at 22-27. They then classify the respect in which the DOL interim presumption is more restrictive than the HEW interim presumption as involving an "evidentiary/adjudicatory" criterion, not a "medical" criterion. *Id.* Both parts of this argument are wrong.

The terms "medical criteria" and the like are terms-of-art. The statements in the legislative history on which the Secretary and the private petitioners rely do not support the contention that the "criteria" to which Section 402(f)(2) refers are medical criteria only. The legislators and others used the words "medical criteria" and similar expressions as terms-of-art to mean all criteria necessary to establish eligibility, a meaning that supports the black lung claimants' interpretation of the statute.

The way in which the legislators and others used the terms "medical criteria" and the like in the legislative history stems from a basic dichotomy in the 20 C.F.R. Part 410 regulations.

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impairments. § 410.490(b). In contrast, under the HEW permanent regulations every claimant is required to prove affirmatively that he is "totally disabled" by presenting evidence (*e.g.*, blood gas studies or ventilatory studies) meeting rigorous standards. §§ 410.422-410.426.

These regulations governed both the Part B and Part C programs prior to the 1978 amendments, and they include the HEW interim presumption at § 410.490. Only subpart D of these regulations governed the determination of eligibility. While the regulations included in subpart D primarily relate to medical criteria, they also include non-medical criteria. *Compare* §§ 410.426(b), 410.430 (medical tests) *and* §§ 410.416, 410.418 (proof of disease causation and disability causation) *with* § 410.426(d) (vocational criteria); *compare also* § 410.422 (entitled "Determining total disability: General criteria") *with* § 410.424 (entitled "Determining total disability: Medical criteria only") *and* § 410.426 (entitled "Determining total disability: Age, education and work experience criteria"). In contrast, the remaining subparts of Part 410 set forth regulations that are not eligibility provisions at all. Rather, they are regulations that govern the processing of claims, including such matters as the duration of benefits for claimants already determined eligible, §§ 410.200-410.216, and the filing of claims. §§ 410.220-410-.233.

The structure of the Part 410 regulations is therefore one in which there is a clear distinction between the eligibility regulations of subpart D, on the one hand, and the processing regulations of the remaining subparts, on the other. The eligibility regulations include principally, though not exclusively, medical criteria, whereas the processing regulations include no medical criteria at all. In this context, it is understandable that the subpart D regulations came to be called the "medical eligibility" regulations notwithstanding the fact that some of the eligibility criteria they include are non-medical.

The committee report on S. 1538, the Senate bill that went to the conference committee, illustrates this point. The report stated that a particular section of the bill:

> does not require nor preclude the blanket incorporation of *any provision* now a part of the existing HEW *medical eligibility regulations (subpart D, 20 C.F.R. Part 410).*

S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977) (emphasis added). The Senate committee thus set forth its understanding

that the phrase "HEW medical eligibility regulations" refers to the entirety of the regulations codified at subpart D of Part 410, not merely to the particular provisions of subpart D setting out strictly medical criteria.

The Solicitor of Labor used the term "medical regulations" in the same way in a 1974 letter to the General Counsel of HEW. There the Solicitor requested HEW to amend the regulations at subpart D of the Part 410 regulations to insert a provision authorizing the Department of Labor to apply the entirety of HEW's interim presumption to Part C claims, concluding:

> It is our firm belief that the only appropriate way to remedy the existing difficulty is for Social Security to amend its *medical regulations* to permit the use of the interim criteria in Department of Labor cases.

DOL Solicitor Letter, n. 9 *supra* at 19 (emphasis added). Accordingly, the term "medical regulations" in the quoted passage referred to all the criteria, not merely the provisions setting out medical tests and other strictly medical criteria.

This usage of the terms "medical criteria" and the like to refer to more than strictly medical criteria under the black lung program has persisted. The Part 727 regulations incorporate the same eligibility/processing dichotomy as do the Part 410 regulations.[31] When the then Secretary of Labor adopted the Part 727 regulations in 1978, he stated:

> [T]he *procedures* contained in Part 725 of this subchapter and not those contained in this part [Part 727] are applicable to the *processing* of [certain] claims. Only the *medical*

[31] The titles of the subparts of Part 727 illustrate the point. *Compare* subpart C ("Criteria for Determining Eligibility for Benefits") *with* subpart A ("General"), subpart B ("Initial Review of Pending and Denied Claims"), subpart D ("Payment of Benefits/Liability"), *and* subpart E ("Special Review Provisions Relating to Claims Pending Before an Administrative Law Judge or the Benefits Review Board").

> *criteria* for determining eligibility with respect to such claims are contained in this part.

43 Fed. Reg. 36825 (1978) (emphasis added). The Secretary used the term "medical criteria" to refer to all the eligibility provisions codified at subpart C of Part 727, including provisions that contain purely medical criteria as well as provisions that contain non-medical criteria.[32]

In sum, such terms as "medical criteria," "medical standards," and "medical eligibility regulations," when used in the legislative history, were terms-of-art. They do not mean what the Secretary and the private petitioners say they mean. Rather, the statements using these terms refer to regulations setting out *all* the criteria necessary to determine a claimant's eligibility, including medical tests, other medical criteria, and non-medical criteria. Consequently, the references, far from providing support for the Secretary's and the private petitioners' interpretation of the statute, support claimants' interpretation instead.

Disease causation is a medical criterion. Even if the references in the legislative history to "medical criteria" and the like were not terms-of-art, but could be read narrowly to include only criteria that are strictly medical, that would not help the

[32] In administering the Title II and Title XVI social security disability programs, the Secretary of Health and Human Services has adopted a similarly expansive use of the term "medical" to refer to all eligibility criteria proving disability, including criteria other than ones that are strictly medical. In recent amendments to the regulations governing the adjudication of social security disability cases, HHS responded to certain comments, stating:

> [F]or purposes of the disability hearing process, we intend *"medical" issues to include* issues which the DDS is empowered to decide under existing regulations, *including "medical considerations" and "vocational considerations."* This same inclusive definition of the term "medical" has been used in Subparts J and N of Parts 404 and 416, respectively, for a number of years. . . .

51 Fed. Reg. 293 (1986) (emphasis added).

Secretary and the private petitioners here. As discussed in § A *supra*, the DOL interim presumption is more restrictive than the HEW interim presumption because, under the DOL version, miners able to prove that they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence) are not allowed to trigger a presumption of total disability by proving that their pneumoconiosis arose out of coal mine employment (i.e., by proving disease causation). The Secretary and the private petitioners label this restrictive criterion an "evidentiary" and/or "adjudicatory" rule. Secy. Br. at 19, 24, 27; Priv. Br. at 22. But such labels cannot be permitted to alter what our common experience and the ordinary meaning of words tell us: the restrictive criterion here—proof of disease causation—is a "medical criterion."[33]

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[33] The private petitioners acknowledge that it is arguable that "'disease causation' is a medical criterion, at least in common parlance." Priv. Br. at 27 n. 36. However, they couple this concession with attempts to evade its consequences. They invoke *Strike* as support for their conclusion that "disease causation is not, in this context, a medical criterion." *Id.* But the *Strike* court reached its conclusion to this effect because it accepted the position that the word "criteria" refers to the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). *See Strike*, 817 F.2d at 401. Thus, to the *Strike* court "disease causation" is not a "medical criterion" because it is not a "medical test." *See id.* at 405. However, this conclusion is wrong because, for the reasons discussed on pp. 22-26 *supra*, the *Strike* court erred by accepting the position that the word "criteria" refers to the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). The private petitioners also say that "'disease causation' in the statute is treated entirely apart from 'disability causation' or total disability." Priv. Br. at 27 n. 36. Even if the statute did treat "disease causation" separately, this would not support the conclusion that "disease causation" is not a "medical criterion." In any case, as explained on pp. 19-20 *supra*, the statute, including the HEW interim presumption as incorporated by Section 402(f)(2), treats these issues as one. Finally, the private petitioners fall back on the deference supposedly owed the Secretary's construction of the statute. Priv. Br. at 27 n. 36. However, as explained in § D *infra*, the Secretary's construction of the statute in this case is not entitled to any deference.

When we feel sick we go to a physician to determine the types of medical conditions that afflict us, and the physician normally must try to determine "disease causation" in order properly to treat the conditions that are diagnosed. Indeed, physicians or other medical professionals are ordinarily the only persons qualified to make these determinations. That is why in personal injury cases plaintiffs must usually introduce a "medical" expert on questions of disease causation. *See, e.g., Hegger* v. *Green*, 646 F.2d 22, 28-29 (2d Cir. 1981).[34] Thus, even if Section 402(f)(2) applies only to medical criteria, the DOL interim presumption fails to comply with the Section's mandate because the respect in which the DOL presumption is more restrictive than the HEW presumption—proof of disease causation—is a medical criterion.

3. The Legislative History Contradicts The Secretary's View That Congress Did Not Wish To Preserve The Ability Of Miners Who Worked Less Than Ten Years In The Mines To Trigger A Presumption Of "Total Disability"

Although the HEW interim presumption enabled miners with less than ten years mining experience to trigger the presumption of disability, the Secretary reads the legislative history to reflect a congressional intention in Section 402(f)(2) *not* "to preserve . . . [that] ability." Secy. Br. at 23. To support this reading, she says that evidence presented before enactment of the 1978 amendments persuaded Congress that miners with less than ten years mining experience rarely contract black lung disease. *Id.* at 23-24.

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[34] What our common and professional experiences tell us, the medical literature on pneumoconiosis confirms. Medical pneumoconiosis has dozens of possible causes. In addition to the inhalation of coal dust, various silicates and metals cause the disease; and only a physician is qualified to determine what the causative agent is. *Cecil Textbook of Medicine* 406-19 (J. Wyngaarden, M.D. & L. Smith, Jr., M.D. 17th ed. 1985).

The Secretary's reading of the legislative history is profoundly flawed. First, the only evidence on which she relies, the report of consultant James Weeks attached to H.R. Rep. No. 151, 95th Cong., 1st Sess. 30-38 (1977), contradicts her position. Citing studies that did show significant x-ray evidence of pneumoconiosis in miners who worked less than ten years in the mines (*e.g.*, *id.* at 36 fig. 4), Weeks suggested that the prevalence of pneumoconiosis was nevertheless underreported because of the inadequacies of x-rays in detecting the disease. *Id.* at 31-32. Weeks considered "more reliable," *id.* at 31, an autopsy study that found pneumoconiosis in greater than sixty percent of the miners who worked less than ten years in the mines. *Id.* at 34 (bar graph).

Second, if Congress believed that miners with less than ten years experience rarely contract black lung disease, it certainly would have considered barring them from eligibility entirely. But the legislative history contains not a hint that Congress ever entertained such an idea. And the Secretary's own permanent regulations, proposed simultaneously with the interim presumption, 43 Fed. Reg. 17732 (1978), and adopted thereafter, 45 Fed. Reg. 13678, 14846 (1980), *do* allow such miners to recover benefits, § 718.203(c), just as HEW's permanent regulations had. §§ 410.416(b), 410.456(b).

Third, the prevalence of pneumoconiosis in miners who worked less than ten years in the mines is irrelevant in any event. A claimant cannot obtain benefits under the HEW interim presumption unless he proves that he does in fact have pneumoconiosis, § 410.490(b)(1)(i), and that it arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456). The legislative history contains no suggestion that Congress would have wanted to deprive those with less than ten years experience who *do* have pneumoconiosis of the availability of the interim presumption even if it were true that many, or even most, other miners who worked less than ten years do not have the disease.

Finally, in support of her position, the Secretary states that DOL incorporated the ten-year statutory presumption at Section 411(c)(1) of the Act, 30 U.S.C. § 921(c)(1), into the DOL interim presumption. Secy. Br. at 23. But the function of the Section 411(c)(1) presumption is not to determine who has pneumoconiosis and who does not. Indeed, it expressly applies only to those who have already proven that they do in fact have pneumoconiosis. Rather, Section 411(c)(1) was designed to help claimants who are unable to prove that their pneumoconiosis arose out of coal mine employment by presuming that fact if they can prove that they worked in the mines for at least ten years. The DOL interim presumption is therefore anomolous. By incorporating the Section 411(c)(1) presumption, the DOL interim regulation provides a presumption of eligibility for many claimants who *are unable to prove* that their pneumoconiosis arose out of coal mine employment. But it fails to provide any assistance whatever for other claimants who *are able to prove* that their pneumoconiosis arose out of coal mine employment.

D. The Secretary's Latest Interpretation Of Section 402(f)(2) Is Not Entitled To Deference

Both the Secretary and the private petitioners vigorously press the contention that this Court should defer to the Secretary's current construction of the statute. Secy. Br. at 27-28; Priv. Br. at 28-30. But no such deference is owing here.

1. The interpretation of Section 402(f)(2) that the Secretary now advances is inconsistent with the construction she made contemporaneously with the statute's enactment. Following enactment of the 1978 amendments, the Secretary promulgated the regulations at 20 C.F.R. Part 727. 43 Fed. Reg. 36818-31 (1978). Section 727.200 of those regulations, entitled "Basis for *criteria*," provided:

> In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the *criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis* shall be no more restrictive than the criteria applicable to a claim filed with the Social Security

> Administration on or before June 30, 1973, under Part B of Title IV of the Act (the interim adjudicatory rules).

§ 727.200 (emphasis added). The import of this provision, the Secretary's contemporaneous construction of Section 402(f)(2) of the Act, could hardly be clearer: the word "criteria" in Section 402(f)(2) of the Act refers, as the black lung claimants contend, to the set of all "criteria for determining [total disability]" in the HEW interim presumption, not just to medical criteria or some other limited set of criteria. *See also* § 718.1(b).[35]

Even though the Secretary properly construed Section 402(f)(2) in § 727.200 of the Department's regulations, the DOL interim presumption at § 727.203 failed to honor this construction. *See* § A *supra*. The inconsistency between § 727.200 (the DOL's regulatory *construction* of the statute) and § 727.203 (the regulatory *implementation* of the statute) was an unintentional oversight according to Mark E. Solomons, the "principal author" of the Part 727 regulations. 43 Fed. Reg. 17766 (1978).[36]

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[35] The then Secretary of Labor presaged this construction when, immediately after Congress passed the 1978 amendments, he urged the President to sign the bill:

> [W]e were opposed to provisions making the use of the "interim standards" mandatory for the determination of total disability under Part C . . . . While we still believe the "interim standards" are inappropriate, the limitation of their use to reviewed and pending claims in conjunction with the requirement that all other relevant evidence be considered reduces our concerns substantially.

Report on H.R. 4544 from Secy. Marshall to James McIntyre, Director, Office of Management and Budget (Feb. 28, 1978), *quoted in* Solomons, n. 9 *supra* at 895 (full text unavailable).

[36] Mr. Solomons made this clear when, as private counsel, he filed briefs in the *Halon* and *Kyle* cases. In those briefs he stated that, until the Benefits Review Board's 1981 decision in *Lynn* v. *Director, O.W.C.P.*, 3 Black Lung Rep. 1-125 (Ben. Rev. Bd. 1981), in which Judge Miller pointed out that the HEW interim presumption does indeed advantage claimants in a manner that the Labor presumption does not, *id.* at 128-35 (dissenting opinion), no one was even aware of

Given the extreme complexity of the black lung statutory and regulatory scheme, the failure of even DOL officials to recognize the restrictive aspect of the DOL presumption is not surprising.[37] What is surprising is the Department's inaction

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that fact. Joint Brief Amicus Curiae on Behalf of the National Association of Independent Insurers and the National Coal Association at 23, 29, *Halon II* (No. 82-3066); Brief Amici Curiae of Old Republic Insurance Co., Pittston Coal Group and Island Creek Coal Co. in Support of the Respondent's Motion for Rehearing at 1 n.1, *Kyle* (No. 85-3535) (citing incorrectly to *Halon*, which came after *Lynn*).

In 1981, Mr. Solomons wrote an article on the interim presumption, which was based in part on his participation in the drafting on both the 1978 amendments to the Act and the DOL interim presumption. Solomons, n. 9 *supra* at 869 n.*. Numerous statements in the article make apparent his view that Congress intended to give claimants subject to Section 402(f)(2) no less than the full benefit of the HEW interim presumption. *E.g.*, *id.* at 874, 892, 893, 895. There is no hint of a contrary view.

[37] The Secretary and the private petitioners point out that after enactment of the 1978 amendments, the members of the House Committee who reviewed the DOL presumption before its promulgation did not suggest that it was inconsistent with Section 402(f)(2). Secy. Br. at 24-25; Priv. Br. at 25-26. However, if no one was even aware that the HEW presumption advantages claimants in a manner that the DOL presumption does not, these legislators would never have had occasion to consider whether, due to this disparity, the DOL presumption is inconsistent with Section 402(f)(2).

The private petitioners also rely on a subcommittee's failure to find fault with the DOL presumption after it conducted oversight hearings relating to the black lung program in 1981. Priv. Br. at 30. However, in contrast to what the private petitioners suggest, the hearings did not entail a "comprehensive review of eligibility standards," *id.*, but concentrated instead on the financial condition of the trust fund. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. *passim* (1981). Moreover, Judge Miller did not issue his dissenting opinion in *Lynn* until May 1981, only a few months before the subcom-

after Judge Miller's dissenting opinion in *Lynn*, 3 Black Lung Rep. at 128-35. *See* n. 36 *supra*. Faced with a clear inconsistency between § 727.200's construction of Section 402(f)(2) of the Act and § 727.203's implementation of the same statutory provision, DOL could have amended its regulations to resolve that inconsistency. But the Department did not do so then and has not done so yet, though more than seven years have passed since Judge Miller revealed the inconsistency. Instead, the Secretary has intensified the inconsistency by advancing successive inconsistent positions in litigation.

The Secretary set forth the first of the Department's litigation interpretations in the brief on the merits in *Halon I*. That interpretation made no distinction between medical and non-medical criteria. Rather, the Secretary, focusing solely on the "not . . . more restrictive" phrase in Section 402(f)(2), read the Section to allow the Department to apply standards that are less favorable than the HEW interim presumption to some claimants as long as they are more favorable than the HEW interim presumption to at least the same number of claimants. Brief of the Respondent, Director, O.W.C.P. at 17-19, *Halon I* (No. 82-3066). The Secretary has abandoned this interpretation entirely.

In his petition for rehearing in *Halon I*, the Secretary shifted to an entirely different interpretation of Section 402(f)(2), contending that the word "criteria" in the Section encompasses only "medical criteria." Petition for Rehearing on Behalf of the Director, O.W.C.P. at 2, 6-13, *Halon I* (No. 82-3066). That interpretation is the same as one of the formulations the Secretary advances to this Court. *See* n. 18 *supra*. But in neither the petition to rehear *Halon I* nor the subsequent petition to rehear *Halon II en banc* did the Secretary present the primary formulation she proffers here, that the

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mittee concluded its hearings. There is no indication that the DOL, after learning that the DOL presumption is more restrictive than the HEW presumption, informed the subcommittee of that fact.

word "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). Secy. Br. at 15, 22.

2. The clarity of the statutory language, the support the legislative history lends claimants' interpretation of Section 402(f)(2), the Secretary's obligation to give the benefit of any doubt to claimants when construing the Act, and the history of the Secretary's varying and inconsistent interpretations of that provision make deference to her latest interpretation inappropriate.

a. Deference to an administrative agency's construction of a statute is not appropriate unless a court, "employing traditional tools of statutory construction," determines that the statute is "silent or ambiguous." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 and n. 9 (1984). However, for the reasons discussed in §§ B and C *supra*, the statute here is neither silent nor ambiguous with respect to the "criteria" to which Congress was referring in Section 402(f)(2).

b. Even if the statute here were silent or ambiguous, the Secretary's proffered interpretation would not be entitled to deference.

i. The Secretary claims that her position is entitled to deference because it is a "reasonable," or at least a "permissible," interpretation of the language of the statute. Secy. Br. at 14, 28. Although agency constructions are normally entitled to deference even if they are merely permissible ones, *Chevron U.S.A.*, 467 U.S. at 843-44, the legislative history of the 1978 amendments make the situation here special. For the committee report accompanying the bill that the Senate passed and sent to conference expressed the expectation that in interpreting the 1978 amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). The DOL, by regulation, has bound itself to comply with this congressional directive. § 718.3(c). But the Secretary violates that obligation here. Where more than one interpretation of the statute is possible,

the Secretary's assumed obligation to follow the directive requires her to adopt an interpretation that is favorable to claimants if it is reasonable. The black lung claimants' interpretation of Section 402(f)(2) is at least a reasonable one. Therefore, the Secretary should have adopted it.

ii. Nothing in the DOL's administrative record concerning Section 402(f)(2) discloses or explains the latest interpretation of the Section that the Secretary advances here. This also makes deference to her interpretation inappropriate. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n. 5 (1978). In her capacity as a party before this Court, the Secretary acknowledges that the HEW interim presumption does favor claimants in a way the Labor presumption does not. However, neither the Department's regulations nor the comments accompanying them even mention that this disparity exists, much less disclose the Department's current view that the disparity is legal, provide the reasons for this view, or disclose that the Department does not follow the construction of Section 402(f)(2) that it published at § 727.200. 43 Fed. Reg. 36824-26 (1978). The interpretation of Section 402(f)(2) that the Secretary offers here, and the reasons for it, are nothing more than "appellate counsel's post hoc rationalizations for agency action" that "the courts may not accept." *Motor Vehicle Mfrs. Assoc'n* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983).

iii. Deference is more readily accorded an agency's construction if that construction was contemporaneous with the enactment of the statute being construed and if the construction has been a consistent one. *NLRB* v. *United Food and Commercial Workers*, 108 S. Ct. 413, 421 n. 20 (1987). However, as explained at pp. 41-44 *supra*, the Secretary's current interpretation is neither contemporaneous nor consistent.

E. A Court May Direct The Secretary Of Labor To Apply The HEW Interim Presumption Because It Has Statutory Force And Effect

The private petitioners argue that even if the DOL interim presumption does not properly implement Section 402(f)(2), a

court cannot simply order the Secretary to apply the HEW interim presumption to the claims subject to the Section. Priv. Br. at 20 n. 30. Such an order, they contend, would violate the requirement that only the Secretary of Labor, not the courts, can issue regulations governing Part C claims, and then only after she complies with the requirements for rulemaking set out in the APA at 5 U.S.C. § 553. Priv. Br. at 20 n. 30 (*citing* 30 U.S.C. §§ 902(f)(1), 936(a)). According to the private petitioners, ordering the Secretary to apply the HEW interim presumption would violate these requirements because DOL did not choose to issue that presumption as a regulation. *Id.* They conclude that the proper course would be to remand the case to the Department for rulemaking. *Id.*

The argument is fallacious because it fails to recognize that with respect to the claims subject to Section 402(f)(2), the HEW interim presumption is not a "rule" at all. Congress incorporated the presumption in Section 402(f)(2) of the Act. By virtue of this incorporation, the presumption gained the force and effect of a statute and therefore is not subject to the rulemaking provisions of the APA. 5 U.S.C. §§ 551(1)(A), 551(4).

Consequently, in directing the Secretary to apply the HEW interim presumption to the claims subject to Section 402(f)(2), the courts of appeals did not, as the private petitioners suggest, usurp the Secretary's "authority to write an agency rule." Priv. Br. at 20 n. 30. Rather, they did what courts are supposed to do: they "interpret[ed] and *appl[ied]* statutory law." *Northwest Airlines* v. *Transport Workers*, 451 U.S. 77, 95 n. 34 (1981) (emphasis added). The private petitioners' position thus reduces itself to the remarkable contention that the courts lack the authority to instruct the Secretary to apply Congress' express statutory commands.[38]

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[38] Although the Secretary has not joined in this argument, the Benefits Review Board recently held that the Secretary could not apply the HEW interim presumption because she had not promul-

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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gated it as a regulation in accordance with the Black Lung Benefits Act and the APA. *Whiteman* v. *Boyle Land and Fuel Co.*, 11 Black Lung Rep. 1-99 (Ben. Rev. Bd. 1988) (*en banc*). Moreover, the Board extended the holding even to claims governed by the law of the circuits that decided *Halon*, *Coughlan*, *Kyle*, and *Broyles* because those courts did not address the issue. *Id.* Thus, the Board's decision in *Whiteman* forbids the Secretary from complying with these circuit court decisions unless she issues a regulation duly promulgated in accordance with the rulemaking requirements of the APA. The Secretary, however, has neither issued nor proposed any such regulation. If this Court determines that the claims subject to Section 402(f)(2) of the Act are entitled to the benefit of the more favorable invocation criterion included in the HEW interim presumption, it should ensure that compliance will be prompt by expressly rejecting the argument that the Secretary must first promulgate a regulation to bring about that result.

(12) (10) (9)

Nos. 87-821, 87-827 and 87-109

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

PITTSTON COAL GROUP, *et al.*,

v. *Petitioners,*

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, Secretary, United States Department of Labor, *et al.*,

v. *Petitioners,*

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Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

v. *Petitioners,*

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

REPLY BRIEF FOR THE PITTSTON COAL GROUP AND CO-PETITIONERS

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REPLY BRIEF FOR THE PITTSTON COAL GROUP AND CO-PETITIONERS

INTRODUCTION

This case presents several issues of great importance. Central to the resolution of these issues is whether the Secretary of Labor violated the clear mandate of section 402(f)(2) of the Black Lung Benefits Act (the "Act"), 30 U.S.C. § 902(f)(2), by promulgating an "interim presumption" that requires at least ten

years of coal mine employment for its invocation on the basis of positive chest x-ray, biopsy, or autopsy evidence of pneumoconiosis, and that permits rebuttal based on medical evidence disproving presumed facts. 20 C.F.R. § 727.203 (1988).

The Fourth Circuit's opinion below holds that the ten year requirement and rebuttal format of the Labor rule violate section 902(f)(2). To remedy this perceived violation, the Eighth Circuit's opinion below requires the Secretary of Labor to reopen at least 94,000 previously adjudicated and denied claims, and relitigate them under 20 C.F.R. § 410.490 (1988), the Social Security Administration's ("SSA") version of the interim presumption.

Pittston and co-petitioners ("Pittston"), and the Secretary of Labor ("Secretary") seek reversal in both cases. Pittston argues that neither the Act nor its contemporary legislative history required the Secretary of Labor to publish an exact replica of the SSA rule. Instead, Congress intended and expected that Labor would promulgate a regulation that preserved the medical guidelines of the SSA rule and that properly suited the adversarial litigation of the Labor Department program. Pittston also contends that section 410.490 violates the Act in several ways and cannot be sustained under due process scrutiny. Further, the Eighth Circuit's reopening of closed cases is jurisdictionally barred by the Longshore Act, 33 U.S.C. §§ 901-952, and is otherwise prohibited by the rule of res judicata.

The Secretary claims judicial deference for the Labor Department rule, noting that the language and intent of the Act bound the Secretary to apply only the SSA medical guidelines and not section 410.490's internal evidentiary rules. Thus, it was permissible for Labor to condition operation of its presumption upon proof of ten years of coal mine employment, and to provide for rebuttal when the evidence disproves presumed facts. The Secretary and Pittston also rely upon post-enactment congressional ratification of the Labor rule. Responding to the Eighth Circuit's mandate, the Secretary relies upon the traditional rules limiting mandamus powers and upon principles of res judicata to demonstrate error in the Eighth Circuit's rejuvenation of previously denied and closed cases.

The *Sebben* plaintiffs and *Broyles* claimants have filed separate responding briefs. Both argue that Labor's rule is not entitled to judicial deference because it violates the plain language of 30 U.S.C. § 902(f)(2), and because the Secretary's proffered justification for her rule is merely a post hoc rationalization by appellate counsel. Sebben's Brief at 17-21, 36; Broyles' Brief at 14-21, 41. Both responding briefs concede, however, that the word "criteria" in 30 U.S.C. § 902(f)(2) means invocation, but not rebuttal, criteria. Sebben's Brief at 35; Broyles' Brief at 18 n.20.[1] Sebben argues that the addition of 30 U.S.C. § 945 to the Act in 1978 created an automatic "collateral right" to consideration under section 410.490 that has not been afforded to the class of claimants described in the Eighth Circuit's decision below. Sebben concludes that 28 U.S.C. § 1361 is available to remedy the Secretary's failure to honor her "clear duty" to review these claims under section 410.490. Sebben's Brief at 40-43.

Trade associations representing the workers' compensation insurance industry and the coal industry filed briefs amici curiae in support of reversal. The insurers contend that they wrote no policies for liabilities arising under section 410.490, were not asked to do so, and would not have done so. Insurance Industry Brief at 11, 18. The coal industry, which would be economically devastated far into the future by affirmance of the decisions below, highlights the advanced age of the affected claims, the Department of Labor's limited ability to defend claims paid by

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[1] Respondents' concession should not preclude the Court's consideration of this critical question. The Fourth Circuit held that section 410.490's rebuttal standards apply, and was obviously unable to reach the conclusion readily embraced by respondents that the word "criteria" in section 902(f)(2) refers only to "invocation criteria." *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987). The Secretary speculates (with uncertainty) that the rebuttal question may be deflected on the theory that the SSA rebuttal provisions are not exhaustive and that Labor's rebuttal format may not be more restrictive than SSA's. Secretary's Brief at 26 n.21. This speculation affords no comfort to employers who would be required to litigate claims under section 410.490 if the decisions below are sustained. It is a fact that in the almost 600,000 claims adjudicated by SSA under section 410.490 there are no published decisions that either permit or even acknowledge the possibility of rebuttal on the basis of medical evidence.

the Trust Fund,[2] and the evidentiary hurdles adopted by the circuits in their rebuttal holdings under section 727.203. The mine owners argue that these circumstances preclude any semblance of fair treatment for them if the decisions below are sustained. Coal Association Brief at 10-11, 16-18.

I. NEITHER THE LANGUAGE OF THE ACT NOR ITS LEGISLATIVE HISTORY PRECLUDES THE SECRETARY'S INTERPRETATION OF THE TERM "CRITERIA" IN 30 U.S.C. § 902(f)(2)

From its origins in a 1972 Senate Report, the black lung "interim presumption" was to consist of a combination of "evidentiary rules" and "disability evaluation criteria." S. Rep. No. 743, 92d Cong., 2d Sess. 18, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322. The distinction between evidentiary rules and disability criteria was well understood by Congress when it first considered the liberalization of Labor's eligibility rules. From 1973 to the promulgation of an interim presumption by the Secretary of Labor in 1978, Department of Labor officials were involved in ongoing deliberations with Congress, SSA and interested constituent groups concerning the application of an interim presumption in Department of Labor black lung claims. *See Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 398-99 (1973-1974) (testimony of Nancy M. Snyder, U.S. Department of Labor). When the debate began, the participants understood that the critical elements of the presumption were the medical test criteria contained in the SSA rule. *Id.* at 75 (testimony of Stephen Kurzman, Department

[2] No mine operator may participate as a party in any claim that is payable by the Black Lung Disability Trust Fund. 30 U.S.C. § 934(b)(1). The Department of Labor has limited ability to defend claims and it is often precluded from challenging favorable x-ray evidence relied on by claimants. *Id.* § 923(b); Insurance Industry Brief at 9 n.9. This means, in effect, that for those miners with fewer than ten years of coal mine employment invocation of the section 410.490 presumption could be virtually automatic.

of Health, Education, and Welfare);[3] *id.* at 204 (testimony of Bruce Boyens, Legal Advisor, Black Lung Association);[4] *id.* at 340 (statement of William Worthington, Chairman, Regional Black Lung Association); *id.* at 353 (statement of Bedford W. Bird, United Mine Workers of America);[5] *id.* at 367, 398 (testimony of John Rosenberg, Director, Appalachian Research and Defense Fund);[6] *id.* at 398 (testimony of Nancy M. Snyder).[7]

In the years that followed, there was no further discussion in testimony, debate or committee proceedings concerning the duration of employment required to invoke the SSA presumption. On the other hand, the medical test guidelines in the SSA rule continued to generate controversy. *See* Pittston's Brief at 8-10 & nn.6-18.

When Congress finally directed Labor to apply certain "criteria" in the categories of claims designated in 30 U.S.C. § 902(f)(2), Labor understood that it was required to write a regulation incorporating SSA's medical test guidelines. Labor did not believe that it was required to include in its presumption other parts of the SSA rule. There is no compelling reason why the Secretary should have reached any different conclusion. In the

[3] Assistant Secretary Kurzman's discussion of the SSA presumption is entitled "INTERIM GUIDELINES ON MEDICAL TESTS."

[4] In discussing SSA's rules, Mr. Boyens testified: "It seems as though a miner who is employed less than 10 years, who can come up with the medical evidence . . . [is] denied his benefits simply because of the fact he worked less than 10 years, thereby getting no benefit of any presumption under the law."

[5] Mr. Bird testified: "[Section 410.490] provide[s] that a man who has worked 15 years in the mines may qualify for benefits if he has x-ray proof of pneumoconiosis, or if he can show by scores on a ventilatory test that he is disabled . . . . "

[6] Testifying in favor of extending the presumption to Labor claims, Mr. Rosenberg stated: "A miner with 10 or 15 years might be required to meet the interim standards, and a miner with less than 10 years, perhaps, a more rigid standard."

[7] Ms. Snyder informed the Committee Chair: "I want to make it clear that we are only talking about one standard. We are talking about the ventilatory. We are not talking about the broad array of standards that were passed in the 1972 amendments."

vast legislative history compiled prior to promulgation of Labor's rule there are no specific references demonstrating that the Secretary of Labor's judgment was erroneous. In fact, there appeared to be agreement that this very powerful presumption should be available only if some significant duration of exposure was established. *See supra* notes 3-7.

Section 902(f)(2) requires application of the SSA "criteria," not SSA's regulation. The Secretary argues that "criteria" means "medical" criteria and that "medical criteria" means the specific medical test guidelines specified in section 410.490. Sebben and Broyles argue that "criteria" means the "invocation" rules, but not the "rebuttal" rules contained in section 410.490. Sebben's Brief at 35; Broyles' Brief at 18-19. Petitioners' interpretation of "criteria" draws support from the language and structure of the Act;[8] respondent's position does not. Respondents' "plain language" analysis shatters on their concession that Congress clearly expected Labor to exclude the rebuttal limitations of the SSA regulation.[9]

The pre-enactment history expresses no specific expectation that the Secretary of Labor must permit invocation by a short-

[8] In addition to the factors previously noted (Secretary's Brief at 18; Pittston's Brief at 20-21), Congress's recognition that there would be significant differences between SSA and Labor rules is clearly reflected in the claim review provisions of 30 U.S.C. § 945(a). A previously denied SSA claimant had the option to elect review by either Labor or SSA. *Id.* § 945(a) (1). If SSA review was elected and SSA approved the claim under section 410.490, the claim was transferred to Labor to be treated in all other respects as if the claim was filed with the Labor Department in the first place, except that the SSA determination of entitlement was binding on Labor. *Id.* § 945(a)(2)(A). The SSA loop would have little meaning if Congress expected absolute parity in the two agency's adjudications. *See also* 124 Cong. Rec. 3431 (1978).

[9] Respondents' challenge to the Secretary's statutory analysis of the term "criteria" offers little more than speculation that the word means only invocation standards. Respondents' statutory analyses are no more compelling than the Secretary's and are probably less so if carefully scrutinized. The Secretary is charged with the responsibility for enforcement of the Act. To be sustained, the Secretary's interpretation need only be reasonable, it "need not be the best one by grammatical or any other standards." *EEOC* v. *Commercial Office Prod. Co.*, 108 S. Ct. 1666, 1671 (1988).

term miner. The Secretary states that the repeated references to "medical criteria" in the legislative history refer to section 410.490's medical guidelines only. Sebben and Broyles argue that the references to "criteria" or "standards," whether or not modified by the word "medical," broadly refer to all of section 410.490(b), and in any case, proof of ten years of employment is a "medical" criterion.[10] Both the petitioners' and the respondents' arguments are plausible, and no ultimate conclusion can be verified from the congressional pronouncements upon which each relies. All parties agree, however, that Congress mandated different presumptions. Sebben and Broyles argue that these differences may be reflected solely in rebuttal provisions;[11] that is only their preference but there is no clear proof that it was Congress's.

Post-enactment congressional activity is more illuminating. Courts may not ignore post-enactment expressions of intent and should accord them the weight they merit. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982). Section 727.203 has been in existence for ten years without once drawing a word of congressional disapproval. During the same term of Congress in which 30 U.S.C. § 902(f)(2) was enacted, the rule was presented for approval to key House conferees. In formal public comment these members approved Labor's rule, with specific reference to the ten year requirement. Pet. App. 46a. The pre-enactment statements of these same members and the reports of the committees they chaired comprise approximately the entire legislative

[10] This latter prong of both responding arguments misses the point. Whether or not disease causation involves medical judgments when a person visits a physician, *see* Broyles' Brief at 39, section 410.490 contains no "criteria" for making such judgments. The Secretary of Labor was directed to apply "criteria" no more restrictive than criteria applied by SSA. The Secretary of Labor contemporaneously understood Congress's references to criteria to mean only the specific medical test guidelines adopted by SSA in section 410.490 for presuming the existence of compensable disability or death. SSA's rule contained no "medical criteria" for determining disease causation so there was nothing to adopt. *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 404-05 (7th Cir. 1987).

[11] "Disease causation" may be rebutted under section 727.203(b)(4) but not section 410.490(c). It is difficult to see how the issue can be a mandatory medical criterion for purposes of invocation but not rebuttal.

history of section 902(f)(2) in the House of Representatives. While post-enactment written approval is not the equivalent of action by the Congress as a whole, given the members involved and the circumstances here, it is tantamount to just that and is highly persuasive. *See Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3255 (1986).

Further, Congress reviewed the program in its entirety in 1980-1981 and requested reports from the Comptroller General examining in detail both Labor and SSA eligibility provisions. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong. 1st Sess. 2-15 (1981) (hereinafter *1981 Oversight Hearings*).[12] The Comptroller General's report to the Congress specifically quoted Labor's rule requiring at least ten years of coal mine employment for invocation of Labor's interim presumption. Comptroller General of the United States, *Report to the Congress of the United States: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 11 (1982), *reprinted in 1981 Oversight Hearings, supra*, at 7. Allegations that Congress was unaware of the Secretary's ten year rule are not credible.

During the 1981 legislative process, neither Congress nor witnesses appearing before it criticized Labor's ten year rule. Congress concluded its deliberations by repealing several of the most significant benefit eligibility provisions enacted in 1972 and 1977, including three statutory presumptions available to long-term miners.[13] The interim presumption had aleady been repealed by regulation and required no congressional action.

[12] Broyles incorrectly states that the 1981 proceedings did not focus on medical eligibility rules. Broyles' Brief at 43 n.37. The amendments enacted in 1981 significantly revised statutory eligibility standards. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, §§ 202, 203, 95 Stat. 1643, 1643. Many witnesses in addition to the Comptroller General testified concerning Labor's eligibility standards. *1981 Oversight Hearings, supra*, at 27, 80, 125, 139, 207-22, 229-39, 253-56.

[13] These presumptions cannot be applied in claims filed on or after January 1, 1982. 30 U.S.C. §§ 921(c)(2), (4), (5).

20 C.F.R. Part 718 (1988).[14] "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'." *Schor*, 106 U.S. at 3255 (quoting *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380-81 (1969)).

The legislative and statutory environment here is not unlike that in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory terms and pre-enactment legislative history fail to provide definitive answers. With respect to the ten year rule, the authorities relied upon by respondents contain no specific answer to the precise question presented. The Secretary of Labor was required to formulate a rule that satisfied the demands of some members of Congress to increase the number of awards made and, at the same time, to preserve the rights of claim defendants and the economic and scientific integrity of the program.[15] The agency's choice controls unless it is irrational or clearly at odds with the intent of the law. *Chevron, U.S.A.*, 467 U.S. at 865-66; *see also K Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). The Secretary's rule reflects a reasonable accommodation in which Congress subsequently acquiesced and, as such, should be approved by this Court. *See Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).

II. THE SECRETARY'S TEN YEAR TRIGGER AND FULL REBUTTAL FORMAT MERIT JUDICIAL DEFERENCE

Broyles and Sebben insist that the ten year rule was adopted either by mistake or in a deliberate effort to violate congressional

[14] The Secretary of Labor was under no obligation to repeal the interim presumption if it proved scientifically valid. 30 U.S.C. § 902(f)(1).

[15] No case can be made to support the proposition that Congress was simply unconcerned with the economic impact of this program on the affected industries or that Congress intended the payment of benefits to miners regardless of the merits of their claims.

intent.[16] Sebben's Brief at 28, 38; Broyles' Brief at 42-44. Their position is erroneous for several reasons. In addition to the statutory language and legislative authorities cited, other factors support Labor's rule.

The Secretary's frequent involvement over many years with the congressional committees that drafted the Act and its amendments is one such factor. What is more significant from industry's perspective, however, is that neither Congress nor the Department of Labor had any scientific justification to make the interim presumption available to short-term miners. In opening briefs, petitioners note that pneumoconiosis is rare in miners with fewer than ten years of coal mine employment.[17] Secretary's Brief at 23-24; Pittston's Brief at 26 n.35. What is even more important is that the degree of "simple" pneumoconiosis found in the few short-term miners who contract the disease is too insignificant to cause impairment much less total disability. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Because of the proof difficulties in rebutting Labor's presumption and its extraordinary power to require awards where pneumoconiosis played only a trivial role in a miner's disability, *see* Coal Association Brief at 10-11 & nn.26-30, it was not unreasonable for the Secretary of Labor to limit availability of the presumption to situations where

[16] Respondents' description of the ten year rule as a mistake followed by a cover-up is naive at best. From the beginning, the black lung program has been literally overrun by congressional watchdogs. Each year from 1969 to 1981 saw congressional hearing after congressional hearing, reports and investigations. There is no likelihood that Labor's ten year rule — a rule significantly affecting almost 100,000 claims — simply escaped this attention. The "ten year" issue arose in claims litigation as a result of the creativity of claimants' attorneys, and not because of any breakdown in communications between Congress and the Secretary. Broyles' contrary assertion twists the facts. *See* Broyles' Brief at 42 n.36.

[17] Section 727.203 applies with equal force to both underground and surface coal miners. The evidence before Congress demonstrated that persons who work exclusively in surface coal mining do not contract pneumoconiosis. On the assumption that a few surface miners "who have worked in extremely dusty situations . . . for long periods of time" might get the disease, surface miners were included in the coverage of the Act. S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972).

there was a rational connection between proven facts and presumed entitlement.

The Secretary of Labor did not preclude short-term miners from obtaining benefits, as asserted by Sebben, but only required them to prove occupationally related total disability. Given the science of the matter, Labor's approach is plainly reasonable.[18]

Sebben suggests that depriving short-term miners of the interim presumption defeats the purpose of the claim review provisions of 30 U.S.C. § 945. Sebben's Brief at 18-20. This is incorrect. After enactment of the 1977 amendments, no claim was decided under SSA's permanent standards alone. The 1977 amendments included many significant liberalizations to be applied in all claims, including those of short-term miners. All previously denied claimants were afforded the opportunity to submit new evidence. 30 U.S.C. § 945(a)(1)(B), (2)(B). The Secretary was prohibited from cross-examining or otherwise disputing

[18] Broyles and Sebben incorrectly dispute congressional awareness of the absence of disease or disability in short-term miners. In 1969 the U.S. Surgeon General reported: "It is generally accepted by physicians that simple pneumoconiosis seldom produced significant ventilatory impairment . . . . For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appeared to be spotty and showed no particular trend." House Comm. on Education and Labor, 91st Cong., 2d Sess., *Legislative History: Federal Coal Mine Health and Safety Act* 572-74 (1970). The long history of the Act contains a considerable body of similar testimony. *See Hearings on S. 355, S. 467, S. 1178, S. 1300 and S. 1907 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. Part II at 587, 641, 699, Part III at A91-A96 (1969). Sebben's assertion (Sebben's Brief at 33) that neither Congress nor the Labor Department could have been aware of the study data cited in Pittston's Brief at 26 is incorrect. These data were derived from an ongoing study required by statute that began in 1970. 30 U.S.C. § 843. Cumulative data are reported to Congress 120 days after the beginning of each session of Congress. *Id.* § 958(a). There is no genuine scientific dispute over the fact that disabling pneumoconiosis in short-term underground miners is exceptionally rare and that it is essentially unknown in surface miners. *See generally* Lapp, *A Lawyers Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721 (1981).

a positive chest x-ray submitted by the claimant if it was originally interpreted by a qualified radiologist. *Id.* § 923(b).[19] Survivors of deceased miners were afforded the opportunity to obtain benefits solely on the basis of their own lay testimony. *Id.* Working miners were given the right to obtain an award if employment terminated within a specified period. *Id.* §§ 902(f)(1)(B), 923(d). And, the definition of "miner" was expanded to include many previously denied claimants. *Id.* § 902(d).

Labor's interim presumption neither defeats the purpose of the statute nor is it irrational. In fact, Labor's rule is perfectly consistent with a statutory scheme in which presumptions are available if duration of employment requirements are met, and unavailable if they are not met. *See id.* §§ 921(c)(1), (2), (4). It is perfectly consistent with the fact that there is little or no probability of a rational connection between proven disease and presumed total disability in the case of a short-term miner. It is also consistent with the Secretary's obligation to honor the statutory directive to permit an award only on account of total disability or death due to coal mine dust exposure. *See id.* § 901(a). And it is perfectly consistent with the Secretary's duty to preserve the rights of claim defendants and affordability of the program. Both Sebben and Broyles come to rest on the premise that the Secretary of Labor was obligated to ignore all other considerations and adopt the most generous entitlement scheme that could be devised. That is not a reasonable reading of the law. *Cf. Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983).

Respondents' argument that the ten year rule is merely a litigation position is clearly erroneous. The rule was published in

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[19] In original budget data submitted to Congress, the Department of Labor estimated that the cost of the x-ray review prohibition in 30 U.S.C. § 923(b) would exceed the cost of the adoption of an interim presumption ($832 million versus $800.5 million). This estimate was revised downward on Labor's unfounded assumption that claimants' physicians would do a better job interpreting x-rays in the future. Staffs of Joint Comm. on Taxation and Senate Comm. on Finance, 95th Cong., 2d Sess., *Tax Aspects of Black Lung Legislation: S. 1538*, at 10 (Comm. Print 1977).

the Federal Register ten years ago by the Secretary of Labor. 43 Fed. Reg. 17,770 (1978). There has been no change in the rule or the agency's position since that time. Respondents characterize the Secretary's arguments as "post-hoc rationalizations of counsel" on the theory that the statutory arguments made by government counsel have been refined since the issue arose in 1981, Broyles' Brief at 46, and on the allegation that the Secretary has done an inadequate job explaining the ten year rule, Sebben's Brief at 37-38. These arguments are not persuasive. An agency is not required to set out its legal arguments in support of a rule prior to litigation. *Cf. Bellotti* v. *Baird*, 428 U.S. 132, 143 n.10 (1976).

Respondents ask this Court to apply the litigation position exception because of subtle refinements in agency arguments over the course of many years. This exception to the deference rule has not been stretched nearly so far by this Court. It is preposterous to suggest that an agency's published interpretation of a statute may be deprived of validity because successive government counsel become more skilled at arguing the agency's position over the course of repetitive litigation.

The existence of a litigation position to which no deference should be accorded may be discerned from a change in position during the course of litigation or from an absence of proof that the agency addressed and answered the question prior to litigation. *See Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 137, 143-44 (1984). These circumstances do not exist here. The ten year rule is an unambiguous, published interpretation by the agency. The agency's actions in administering the rule have never varied. The arguments made by government counsel in support of the rule have been consistent. It is clear that the statutory interpretation reflected in Labor's rule was made by the agency and not its lawyers.

III. THIS COURT MAY NOT PROMULGATE SECTION 410.490 FOR THE SECRETARY OF LABOR

On the assumption that this Court will be persuaded of the invalidity of Labor's ten year rule, respondents ask the Court to

promulgate section 410.490's invocation (but not rebuttal) provisions for the Labor Department. Sebben's Brief at 38 n.76; Broyles' Brief at 47. Respondents assert that section 410.490(b) is part and parcel of the Act and thus requires no rulemaking for its application.

Courts are not vested with authority to write agency regulations. *See Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). Congress neither wrote nor intended to write agency rules in 30 U.S.C. § 902(f). Congress provided guidelines to be sure, but it instructed the Secretary of Labor to promulgate regulations implementing the statutory guidelines. There can be no argument on this account. 30 U.S.C. §§ 902 (f)(1), 936(c); H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 308, 309.

What is most troubling about respondent's request that this Court simply declare section 410.490(b) to be a statutory provision is that the substantive standards at issue have never been tested in either the legislative or regulatory process. Congress had no evidence to support the creation of a presumption of entitlement based upon proof of simple pneumoconiosis in short-term miners. To the contrary, Congress had a considerable body of evidence that no such presumption could be justified. *See supra* pp. 10-11. There have never been rulemaking proceedings in which section 410.490 was tested as a regulation affecting private rights.

If section 410.490(b) is treated as a congressional enactment, it must meet the test of reason. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 29. On the face of the legislative record, a presumption of total disability or death due to pneumoconiosis for a short-term miner meeting the specified medical criteria is a purely arbitrary mandate. At best, Congress has never fully investigated the question. If section 410.490 is tested as an agency rule, it must glean support from the administrative record compiled by the agency. No such record exists.

It would be wholly inappropriate for this Court to adopt a rule of substantive law of considerable impact that has never passed muster in the legislative or regulatory process.

IV. THE MANDAMUS STATUTE DOES NOT OVERRIDE THE LONGSHORE ACT OR PRINCIPLES OF RES JUDICATA IN PART C BLACK LUNG CLAIMS

Sebben's arguments in support of the Eighth Circuit's decision presume that the body of procedural law that has evolved under the Social Security Act is applicable, at least by analogy, in Department of Labor black lung claims. The premise is clearly flawed. The Social Security Act does not apply. The Longshore Act sets the rules of procedure for these claims, 30 U.S.C. § 932(a), and it, like the Social Security Act, contains a unique and independent adjudicative format. *See Crowell* v. *Benson*, 285 U.S. 22 (1932); *see also Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1 (1975).

Longshore Act procedures are designed for the adjudication of private rights in the course of adversary litigation. *Crowell*, 285 U.S. at 51-54. Social Security procedures are not. *See Richardson* v. *Perales*, 402 U.S. 389, 403 (1971). After a Social Security Act claimant submits a proper claim, subsequent time limitations and exhaustion requirements may be waived. *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). Prior to *Sebben*, all circuits agreed that each movement of a Longshore Act claim from one level of adjudication to another imposes a non-waivable jurisdictional requirement on the party seeking further agency or judicial review.[20] The Social Security Act authorizes eventual district court review of SSA decisions on the merits of the case, *Weinberger* v. *Salfi*, 422 U.S. 749, 763 (1975), while the Longshore Act does not, 33 U.S.C. § 921(e). It is arguable whether the Social Security Act embodies traditional res judicata principles. *See Schweiker* v. *Chilicky*, 108 S. Ct. 2460, 2468 (1988). The Longshore Act does embody such principles. 33 U.S.C. § 921(a),

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[20] The many cases so holding are cited in Pittston's Brief at 37-38 nn.55 & 56; Secretary's Brief at 34.

(c); *Downs* v. *Director, Office of Workers' Compensation Programs*, 803 F.2d 193, 199 n.13 (5th Cir. 1986).

Sebben ignores the exclusivity of the Longshore Act remedy. He argues that the rights conferred by 30 U.S.C. § 945 to review under section 410.490 (or at least the invocation portion of it) are "collateral" to his claim for benefits and cannot be remedied under the Longshore Act. Sebben's Brief at 43-44. This argument is far off the mark. The right conferred in 30 U.S.C. § 945 is a right to utilize Longshore Act procedures for readjudication under an array of statutory provisions enacted in 1978. 30 U.S.C. § 945(a)(3)(A). Any such review was to be conducted under rules subsequently published by the Secretary of Labor. *Id.* §§ 902(f)(1), 936. There is no statutory guarantee that any or all of the revised rules must benefit every claimant. *Id.* § 945(a)(1)(A)-(B), (b)(2)(A). All claimants in the *Sebben* class had their claims reviewed pursuant to 30 U.S.C. § 945, but were denied benefits because the evidence failed to establish entitlement. Sebben is dissatisfied with the Secretary's application of the substantive law, but this is not collateral to Sebben's claim.[21] Congress has provided an exclusive procedure to address the dispute. 33 U.S.C. § 921(e).

Sebben's allegation that there was no adequate remedy at law is tied to the fiction that a claimant not provided "automatic" review[22] under section 410.490 would simply give up and fail to

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[21] Even if it were collateral, it is difficult to see what difference it makes with respect to the district court's jurisdiction under 28 U.S.C. § 1361. Sebben's reliance on *Eldridge*, 424 U.S. at 330-31 & n.11, regarding "collateral" matters is misplaced. *Eldridge* merely restates the rules governing appeals of non-final orders. All persons in the *Sebben* group had final orders, but did not exercise their appeal rights. Moreover, allegations of irreparable harm to *Sebben* class claimants are similarly without factual foundation or legal significance. No harm accrues to a litigant solely because he is required to advocate his case in keeping with statutory procedures.

[22] While some, but not all, of the claimants in the *Sebben* class were entitled to automatic review, none were entitled to an automatic award of benefits. In order to obtain a final award or sustain an initial determination, *see* 30 U.S.C. § 945(a)(2)(A), many of these claimants would be required to overcome

(Continued on next page)

pursue available remedies. Many claimants did not pursue their claims after automatic review, but many thousands did. We have no way of knowing what factors influenced their individual decisions. It is clear, however, that remedies were available. These remedies were published and fully adequate, and all claimants were informed of their rights.[23] These claimants, like all other civil litigants, are charged with knowledge of the available procedural rights. *Atkins* v. *Parker*, 472 U.S. 115, 130 (1985). Sebben contends that the pursuit of these remedies would have been futile, but does not and cannot make a showing to support that assertion. Failure to pursue these rights is clearly not a proper reason supporting equitable relief under the mandamus statute. *Cf. Lyng* v. *Payne*, 106 S. Ct. 2333, 2341 (1986).

For almost two centuries, this Court has refused to permit the exercise of mandamus powers if the party seeking the writ has an adequate remedy at law. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 169 (1803). If the alternative remedy prescribed is exclusive, and Congress has so provided, it is difficult to imagine circumstances in which mandamus powers are properly exercised.[24]

Building on the assumption that the claimants in the *Sebben* class never had a right to review de jure, Sebben asserts that res judicata principles become irrelevant. " '[N]o principle of law or equity . . . sanctions the rejection by a federal court of the salutary principle of *res judicata*.' " *Federated Dep't Stores, Inc.* v.

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a mine owner's defense to the claim. Claimants who filed before July 1, 1973, *id.* § 945(a), or after March 1, 1978 were not entitled to automatic review but are included in the *Sebben* class. If Sebben's argument is accepted, the remedy cannot apply to those individuals because the Secretary of Labor did not owe them a non-discretionary duty of review.

[23] Department of Labor forms CM1000a, or 1000b, or 1000c, or 1000d were sent to all denied claimants and these forms each contained several pages of information on how a claimant could have pursued further remedies.

[24] An infringement of constitutional right would, in all likelihood, be an exception to the rule. *See Johnson* v. *Robison*, 415 U.S. 361, 366 n.7 (1974). This case involves no arguable claim of constitutional right on the part of the *Sebben* class.

Moitie, 452 U.S. 394, 401 (1981) (quoting *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946)). Sebben fails to cite any exception to this rule to justify its abrogation here. In many of the *Sebben* class cases the employer litigated and prevailed. There is no precedent supporting the use of mandamus powers to undo the res judicata effect of these prior proceedings. It makes no sense for this Court to hold that the adjudications that took place and became final simply never happened.

Overall, Sebben's effort to sustain the Eighth Circuit's reopening of tens of thousands of cases rests on an exaggerated and contrived portrayal of the Secretary of Labor's alleged breach of duty to short-term coal miners, and an equally understated estimation of the enormous hardship that would follow enforcement of the Eighth Circuit's order. The clear non-discretionary duty on which Sebben relies is nowhere stated, with even minimal specificity, in the Act or legislative history.

Since mandamus is a remedy in equity, its impact on all parties involved must be considered. The insurance industry details the enormous potential cost to the coal industry and insurers of reopening and relitigating tens of thousands of affected claims.[25] Insurance Industry Brief at 9. It is noted, correctly, that none of this liability was anticipated or funded.

Reopening presents difficult problems beyond its economics. The claims affected will be ten to twenty years old by the time they are considered. Records have been lost and destroyed, witnesses are no longer available, and many miners are deceased. Moreover, it is extremely difficult to prove, in a presumption

[25] Sebben states that these costs are largely based on the irrebuttability of the SSA presumption. Sebben's Brief at 46. While rebuttability is a significant factor, it is not the fundamental premise of the insurers' cost analysis. Even if the Labor rebuttal provisions applied, invocation of the presumption remains the critical element in producing an award. The unfunded costs associated with reopenings, new trials, new evidence, and an aging population of claimants remains in the billions of dollars. The Court should also note that benefits are paid retroactively to the date of original filing in most cases. *See Curse* v. *Director, Office of Workers' Compensation Programs*, 843 F.2d 456, 461 (11th Cir. 1988).

rebuttal inquiry, that pneumoconiosis "played no part" in the inability of a seventy or eighty year old retired miner[26] or a now deceased miner to perform his prior coal mine work. *See Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). In many of these cases, the mine owners' first knowledge of the existence of a claim would occur in the reopening proceedings.[27] There is a genuine question whether a mine owner's due process rights can be preserved in these circumstances. *See Federal Deposit Ins. Corp.* v. *Mallen*, 108 S. Ct. 1780, 1788 (1988).

The circumstances neither permit nor otherwise justify the overwhelming relief granted by the Eighth Circuit. The Eighth Circuit had no sound legal basis for authorizing a waiver of the Longshore Act's jurisdictional requirements. It had no valid basis on which to abrogate res judicata to the substantial detriment of the private interests of mine owners and their insurers. The courts below erred in treating the Labor Department's black lung program as the legal equivalent of the entitlement programs administered by SSA, and they clearly misapprehended the respective rights of the parties as well as the legal duties of the Secretary of Labor.

[26] Most claims are first filed when a miner reaches normal retirement age.

[27] Labor did not necessarily notify defendants of the existence of claims unless, following an ex parte administrative denial, the claimant indicated an intent to further pursue the case. 20 C.F.R. § 725.412(a) (1988).

CONCLUSION

The decisions of the Fourth and Eighth Circuits should be reversed.

Respectfully submitted,

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August 25, 1988

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(13) (11) (10)

Nos. 87-821, 87-827, and 87-109

In the Supreme Court of the United States

OCTOBER TERM, 1988

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

ANN MCLAUGHLIN, SECRETARY
OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND EIGHTH CIRCUITS

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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v.

JAMES SEBBEN, ET AL.

No. 87-827

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

No. 87-1095

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. The primary issue before the Court is whether the Department of Labor's interim regulation applicable to claims filed before 1980, 20 C.F.R. 727.203, is consistent with the statutory commandment of Section 402(f)(2) of

the Black Lung Benefits Act of 1972, 30 U.S.C. 902(f)(2), that the regulation's "criteria * * * not be more restrictive" than those applied under HEW's interim regulation, 20 C.F.R. 410.490, which governed claims filed before July 1, 1973. Both the Labor and HEW interim regulations provide for a rebuttable presumption procedure by which claimants may be found entitled to benefits without direct proof of all of the statutorily required elements of 1) total disability; 2) caused by pneumoconiosis; 3) arising out of coal mine employment. *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5. The courts below have ruled, incorrectly we submit, that the conditions for invoking the rebuttable presumption under the Labor regulation impermissibly result in more restrictive "criteria" than the HEW regulations. Specifically, under the HEW regulation some claimants who offer proof of pneumoconiosis but have fewer than ten years of coal mine experience may trigger the presumption by otherwise proving that coal mine employment was the cause of their disease, while under the Labor regulation no such alternative proof of causation may be offered by claimants with fewer than ten years of coal mine employment in order to trigger the presumption.

We argued in our opening brief that this difference in the method of proving coal mine causation in order to trigger the rebuttable presumption of entitlement to benefits is not a more restrictive criteria as that term is used in Section 402(f)(2). Section 402 defines various terms used in the statute, and Section 402(f)(2), which bars the use of more restrictive criteria, is part of the definition of "total disability." The criteria referred to thus bear on the issue of whether a person is totally disabled, not on the statutory requirement relating to coal mine causation of that disability. In our view, therefore, Congress in Section

402(f)(2) was referring to medical criteria relating to whether a claimant is totally disabled, not to HEW's evidentiary and adjudicatory rules, including its allowance of evidence other than duration of employment in order to prove coal mine causation.

The Sebben respondents contend in response that "total disability" is actually a "term of art" (Br. 23) embodying the three elements of entitlement to black lung benefits—total disability, pneumoconiosis, and coal mine causation. See also Broyles Br. 20 n.22. They rely on Section 402(f)(1)(A), 30 U.S.C. 902(f)(1)(A), also part of the definition of "total disability," which provides that "a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged." They also rely upon the definition of "pneumoconiosis" (§ 402(b), 30 U.S.C. 902(b)), which provides that it is a pulmonary disease caused by coal mine employment. Read together, they suggest, these provisions lead to the conclusion that "total disability" is the statute's way of referring to the ultimate question of entitlement to benefits, and the reference to "criteria" embodies any evidence bearing on that issue.

The *Sebben* respondents' construction of "total disability" to include not only the fact of disability, but also the disabling disease—pneumoconiosis—and its coal mine causation, is at best an awkward and counterintuitive use of language. Ordinarily, whether a person is totally disabled is considered a question distinct from what caused his disability. See *Black's Law Dictionary* 1336 (5th ed. 1979). Also, as the Sebben respondents concede (Br. 23 n.38), their construction is not supported by what would be several redundant references in the Act (see, *e.g.*, 30 U.S.C.

901(a), 922(a)(1) and (3)) to miners who are totally disabled "due to pneumoconiosis."

In addition, nothing in the history of the enactment of Section 402(f)(1)(A)—which contains the only reference to pneumoconiosis within the definition of total disability—suggests that Congress had a purpose to bundle the whole question of entitlement to benefits into the term "total disability." That section, which was added to the statute in 1972, had the distinct purpose to modify HEW's prior determination that a miner had to show inability to do *any* gainful work to be considered totally disabled, not to turn it into a term of art. See Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 4(a), 86 Stat. 153; S. Rep. 92-743, 92d Cong., 2d Sess. 16-17 (1972). Absent some clear indication of a further purpose to convert the definition of "total disability" into a term of art incorporating all the elements of a claim, "total disability" should be construed in light of its ordinary meaning. See *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985).

The Broyles respondents assert (Br. 39) that even if the "criteria" referred to in Section 402(f)(2) are medical criteria, the cause of a miner's disability is often a question best answered by a physician, so that the causation element of HEW's interim regulation is included in the criteria preserved by Section 402(f)(2). But that argument relies on the same counterintuitive concept of "total disability." What causes a miner's pneumoconiosis is a distinct question from whether the claimant is totally disabled. Notwithstanding that a physician's opinion may be relevant to the causation question, that opinion will rest on a distinct body of evidence and relate to a separate issue. The fact that medical expertise may be relevant on the question of causation does not suggest that the criteria used to define total disability include those used to determine causation.[1]

Both respondents concede (Sebben Br. 34-36; Broyles Br. 18 n.20) that Labor's interim regulation is not defective on the ground that it incorporates methods of rebutting the presumption of entitlement to benefits which were not expressly set forth in HEW's interim regulation.[2] In so doing, they have conceded that "criteria" does not include all the evidentiary and adjudicatory rules in HEW's interim regulation. Indeed, their concession applies to the most important adjudicatory rule because, as the Broyles respondents admit (Br. 24 n.24), whether a claimant obtains benefits "is ultimately determined using the various re buttal methods." [3] Respondents thus urge that "criteria" in

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[1] The Broyles respondents also argue (Br. 25) that Congress intended "criteria" in Section 402(f)(2) to mean more than medical criteria relating to total disability because in Section 402(f)(1)(C), 30 U.S.C. 902(f)(1)(C), Congress required the use of "criteria" no more restrictive than those used by HEW in social security disability determinations, and vocational as well as medical criteria are both used in making social security determinations. The argument is without merit, however. Vocational and medical criteria are both relevant in determining whether a claimant is totally disabled. Causation is a distinct issue apart from the fact of total disability, and the manner in which it may be proved does not alter the criteria governing the existence of the disability in the first place.

[2] HEW's interim regulation provides for rebuttal by showing that the individual is doing coal mine work or comparable work or is able to do so. Labor's interim regulation allows rebuttal on these grounds, and also expressly authorizes rebuttal by showing that the miner's disability "did not arise in whole or in part out of coal mine employment" and that "the miner does not * * * have pneumoconiosis" (20 C.F.R. 727.203(b)(3) and (4)).

[3] The Sebben respondents similarly recognize (Br. 46) that the differences between the rebuttal provisions of the interim regulations are much more important, in practice, than the difference in the methods of invoking the presumptions. As they state, the predictions by the private petitioners (Br. 3 & n.7) and amicus National Council on Com-

Section 402(f)(2) refers to the adjudicatory and evidentiary rules employed by HEW in connection with invocation of the presumption, but not those relating to rebuttal of the presumption. Nothing in the language of the provision or its legislative history offers any basis for such a peculiar construction of the statute. Our interpretation, in contrast, is closely tied to both the language of Section 402(f)(2) and its legislative history, which show that Congress intended to require Labor to use HEW's medical criteria, particularly the ventilatory study scores in its interim regulation, in determining total disability, until it devised new "medical tests * * * which accurately reflect total disability in coal miners" (§ 402(f)(1)(D), 30 U.S.C. 902(f)(1)(D)).

In arguing that Labor was confined by HEW's approach to invoking the presumption, but not by its approach to rebuttal, the Sebben respondents rely explicitly on the Conference Report for the proposition that Congress clearly intended to require the use of the additional rebuttal methods recognized by Labor. That Report, they correctly note, clearly "mandat[ed] that 'in determining claims under [the interim] criteria all relevant medical evidence shall be considered in accordance with the standards prescribed by the Secretary of Labor.' " Br. 35 (quoting H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978)); see also Broyles Br. 18 n.20. In so acknowledging, however, they ignore the very next sentence of the Conference Report, stating that "all standards are to incorporate the presumptions contained in section 411(c) of the Act." Section 411(c)(1), 30 U.S.C. 921(c)(1), states that it should be presumed that "pneumoconiosis arose out of such employment" in cases involving claimants who worked for ten years as a coal miner. Congress thus attached great significance to the presumption of causation based on ten years of coal mine employment. In contrast, respondents have pointed to no evidence whatsoever that Congress intended that miners with fewer than ten years of coal mine experience should be allowed to establish a presumption of entitlement to benefits if they presented X-ray evidence showing pneumoconiosis.

The medical evidence underlying Congress's mandate that "all standards" incorporate the ten-year presumption contained in Section 411(c)(1) showed that miners were unlikely to have contracted disabling pneumoconiosis in that period of time, as we stated in our opening brief (at 23-24). In complaining (Sebben Br. 32) that we cited only one medical reference, respondents failed to note that the medical report we cited was appended to a 1977 congressional report, and hence is the most relevant study indicating what Congress understood at the time it enacted Section 402(f)(2), and that it summarized the evidence in a manner highly favorable to claimants.[4] As respondents

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pensation Insurance, et al. (Br. 9 & n.9) that a large number of claims that would be denied under Labor's interim regulation would be granted under HEW's interim regulation were based on the assumption that the additional methods of rebutting the presumption available under Labor's regulation would not be available if the respondents prevail here. If the additional rebuttal methods are available in any event and relevant evidence can be obtained, then it would seem that, as we suggested in our petition (at 12) in No. 87-827, the massive reopening ordered by the Eighth Circuit, while creating a substantial administrative burden, may change the result in relatively few cases.

[4] The medical reference was appended to the House Report in support of the provision in its bill that would have provided black lung benefits to all persons who worked for 30 years in coal mines (see H.R. Rep. 95-151, 95th Cong., 1st Sess. 5 (1977)). That provision, which was opposed by many members of the House committee (see *id.* at 80-84) and was not adopted by the Senate, was not enacted.

stated, the studies summarized in the medical report showed that miners with fewer than ten years' experience in coal mines may contract pneumoconiosis. However, "pneumoconiosis is customarily classified as 'simple' or 'complicated[,]' " and "[s]imple pneumoconiosis * * * is generally regarded by physicians as seldom productive of significant respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Congress plainly recognized in enacting the Black Lung Benefits Act that pneumoconiosis is not necessarily disabling, since, as Section 401(a) states, the purpose of the Act is to provide benefits to miners "totally disabled due to pneumoconiosis," not just to miners who contracted pneumoconiosis. Respondents failed to note that the studies summarized in the medical report appended to the House report showed that almost all cases of *disabling* pneumoconiosis occurred in miners with substantially more than ten years' experience.[5] In fact, the medical report suggested that paying miners benefits after 15 years of experience would "be good preventive medicine" since it would remove them from coal mines before they developed a disabling form of

[5] One of the studies summarized in the medical report showed that of 104 miners with more than 30 years of coal mine experience, 47 showed X-ray evidence of complicated pneumoconiosis or advanced simple pneumoconiosis, while none of the 35 miners with fewer than ten years of experience had complicated pneumoconiosis (H.R. Rep. 95-151, *supra*, at 34). Indeed, only two of the 35 miners with fewer than ten years' experience showed any evidence of pneumoconiosis (*ibid.*). Another study summarized in the medical report, which both respondents cited (Sebben Br. 32; Broyles Br. 40), showed a higher incidence of pneumoconiosis based on autopsy evidence. However, as the bar graph summarizing the autopsy study shows, complicated pneumoconiosis, as well as "severe" cases of simple pneumoconiosis, while common among miners with extensive experience, was uncommon among miners with fewer than ten years' experience (H.R. Rep. 95-151, *supra*, at 34).

the disease. H.R. Rep. 95-151, 95th Cong., 1st Sess. 33 (1977). In light of that evidence, it is implausible that Congress would have required Labor to presume that miners with X-ray evidence of simple pneumoconiosis but fewer than ten years of coal mine experience are entitled to benefits.[6]

Both respondents (Sebben Br. 36-37; Broyles Br. 41-42) contend that the Secretary's interpretation of Section 402(f)(2) is not entitled to deference because it is a post hoc rationalization that was not made contemporaneously with the implementation of the statute. There is no basis for that contention. Labor's interim regulation was finally promulgated on August 18, 1978, less than six months after the 1978 amendments took effect, and the first sentence of the regulation has always required that a claimant show that he "engaged in coal mine employment for at least 10 years" in order to invoke the presumption (20 C.F.R. 727.203(a)). The Secretary's interpretation is plainly a contemporaneous construction of Section 402(f)(2) that is entitled to deference.

[6] Labor, like HEW (see 20 C.F.R. 410.416(b)), has recognized that miners with fewer than ten years' experience may contract pneumoconiosis (see 20 C.F.R. 718.203(c)). Broyles, who had five years of coal mine experience and 20 years of experience in other dusty occupations, was "given the benefit of the doubt" that his pneumoconiosis was caused by coal mine employment (87-1095 Pet. App. 15a-16a). The Sebben respondents thus err in stating that "a person with 9.5 years of exposure * * * is barred from even attempting to prove that this condition was caused by mine employment" (Br. 29). Such claimants are barred only from establishing a presumption that they are entitled to benefits. And, while it would normally be the case that pneumoconiosis resulting from limited coal mine experience would not be disabling, nothing in the regulations prevents miners with fewer than ten years of experience from showing that they are totally disabled due to pneumoconiosis and hence entitled to benefits; again, they simply may not invoke a presumption of entitlement.

2. The Sebben respondents argue that the Eighth Circuit correctly ordered the Secretary to reopen all Part C claims arguably denied by virtue of the alleged defect in Labor's interim regulation. They rely on Congress's 1978 enactment of Section 435(b), 30 U.S.C. 945(b), directing the Secretary to review each claim denied prior to or pending on March 1, 1978, taking into account the provisions of the Black Lung Benefits Reform Act of 1977, including the "no more restrictive criteria" requirement of Section 402(f)(2).[7]

As an initial matter, it should be noted that it is undisputed that the Secretary reopened the Part C claims that had been denied and reconsidered them, along with unresolved, pending claims, under Labor's interim regulation. Thus, their claims were "automatically" reviewed in light of the 1978 amendments. And, as the evidence cited by the Sebben respondents shows (Br. 8 & n.21), review under Labor's interim regulation had a major impact, since the approval rate of Part C claims more than quadrupled (from less than 10% to 45%) under Labor's interim regulation. Claimants with fewer than ten years of coal mine employment benefited from the Secretary's review following the 1978 amendments since an expanded definition of pneumoconiosis (30 U.S.C. 902(b); 20

[7] The Sebben respondents admit (Br. 45 n.85) that the right to "automatic" review did not extend to two of the subclasses of their putative class. Those miners whose claims were denied under the Part B program had to request review in light of the 1978 amendments, and therefore had no right to automatic review. See 30 U.S.C. 945(a); 20 C.F.R. 410.704(d). Those miners who filed claims after the effective date of the 1978 amendments but before April 1, 1980, also had no right under Section 435(b) to automatic review of their files in light of the 1978 amendments, since they had not filed claims prior to the 1978 amendments. The Sebben respondents have provided no basis for reopening the claims of members of these subclasses.

C.F.R. 727.202, 718.201), a prohibition against re-reading certain X-rays (30 U.S.C. 923(b)), and worker's compensation principles of causation (S. Rep. 95-209, 95th Cong., 1st Sess. 13-14 (1977)) applied to their claims as a result of the amendments. In addition, the 1978 amendments gave them a right to a complete pulmonary examination at the expense of the Black Lung Disability Trust Fund. 30 U.S.C 923(b); 20 C.F.R. 725.406(c). In short, there is no basis for respondents' claim (Sebben Br. 40) that "the Secretary went through [a] largely meaningless exercise" in considering their claims in light of the 1978 amendments.

The members of the putative class contend only that Labor's interim regulation did not fully satisfy the "no more restrictive criteria" requirement of Section 402(f)(2). This argument could have been raised on administrative and ultimately judicial review of the post-1978 denials of those claims. And nothing in Section 435(b) suggests that Congress intended to exclude those claims from the provisions governing available administrative and judicial review. To the contrary, Congress intended such review to be available to "all claims certified, referred, or otherwise subject to review by the Secretary of Labor." H.R. Conf. Rep. 95-864, *supra,* at 23. In addition, as we stated in our opening brief (at 34), the statute sets *jurisdictional* time limits for claimants to seek review of decisions denying benefits.[8]

[8] See, *e.g.*, *Danko* v. *Director, Office of Workers' Compensation Programs,* 846 F.2d 366 (6th Cir. 1988); *Butcher* v. *Big Mountain Coal, Inc.*, 802 F.2d 1506 (4th Cir. 1986); *Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs,* 798 F.2d 215, 217 (7th Cir. 1986); *Clay* v. *Director, Office of Workers' Compensation Programs,* 748 F.2d 501, 503 (8th Cir. 1984); *Insurance Co. of North America* v. *Gee,* 702 F.2d 411 (2d Cir. 1983); but see *Brown* v. *Director, Office of Workers' Compensation Programs,* No. 87-7358 (11th Cir. Aug. 15, 1988).

Respondents have failed to justify the invocation of mandamus to compel the reopening of cases which the Secretary has already considered once pursuant to the automatic review requirement of Section 435(b). Even if one were to accept the argument (Sebben Br. 48-49) that a doubtful duty (such as the alleged duty under Section 402(f)(2) to allow claimants with fewer than ten years of coal mine experience to invoke the presumption of entitlement to benefits) may become sufficiently clear after a court construes a statute to justify mandamus relief (Br. 48-49), the Sebben respondents have neglected to explain how any provision in the Black Lung Benefits Act calls for any further reopening of claims that were finally denied after review under the 1978 amendments. Since nothing in the Act even arguably requires the Secretary to reopen yet again such claims which have not been pressed on administrative review, mandamus is plainly not warranted.[9]

[9] Even if one concluded, as we do not, that claimants had a "collateral" right to an automatic review of their claims under respondents' standard for invoking the presumption of entitlement to benefits (Sebben Br. 40-41), such a right would not excuse their failure to press that issue until long after their cases were closed. The primary relevance of such a conclusion would be that earlier – not later – review of the issue might be justified. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976) (plaintiff sought to go directly to court to expedite resolution of his claim).

In this case, recognition of a collateral right to automatic review under respondents' standard might have justified a petition to the Benefits Review Board – even before final consideration of their claims by an administrative law judge – to press for consideration of their claimed right to consideration under their standard. The Board recognizes the collateral order doctrine (*Morgan* v. *Director, Office of Workers' Compensation Programs*, 8 B.L.R. 1-491, 1-493 (Ben. Rev. Bd. 1986); *Holmes & Narver, Inc.* v. *Christian*, 1 B.R.B.S. 85, 88 (Ben. Rev. Bd. 1974)). Having failed to raise the issue either early or following denial of their claims, respondents certainly cannot invoke the collateral order doctrine to justify a right of review to be asserted whenever they please.

The Sebben respondents rely heavily on *Bowen* v. *City of New York*, 476 U.S. 467 (1986). In the process, they ignore the distinction between the concealed application of an illegal requirement to screen out claimants (as in *Bowen*) and the open and public application of a standard alleged to be incorrect.[10] The exhaustion requirement was waived in *Bowen* not because the agency applied the incorrect standard, but because it concealed from claimants, and thus prevented them from challenging in a focused way, the illegal hurdle it was placing before them (*id.* at 484-485). The administrative review process exists to allow for the correction of errors, and administrative autonomy justifies an exhaustion requirement so that the agency may have a chance to discover and correct its own errors. *McKart* v. *United States*, 395 U.S. 185, 195 (1969). Absent the sort of impairment of the review process identified in *Bowen*, there is no basis for a court to permit circumvention of a statutorily-mandated scheme of review.

Finally, the Sebben respondents present no reason not to invoke res judicata. They do not dispute that black lung adjudications resemble adversary court proceedings, which, as we stated in our opening brief (at 36), leads to the conclusion that their claims are barred. Respondents' sole discussion of res judicata (Sebben Br. 44-45) states that it does not apply because there has been no ruling on their asserted right to automatic review. But res judicata, of course, bars relitigation of issues that could have been raised in prior proceedings, whether or not they actually were raised. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); 1B J. Moore, *Moore's Federal Practice* ¶ 0.405[3], at 190-193 (1988). Accordingly, the Eighth Circuit erred in ordering the Secretary of Labor to

[10] This case is also distinguishable from *Bowen* by the jurisdictional nature of the time limits under the Black Lung Benefits Act.

reopen claims that had been finally denied.[11]

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor
Department of Labor

AUGUST 1988

[11] As noted in our opening brief (at 38), the reopening effort mandated by the Eighth Circuit would place an enormous strain on the black lung benefits adjudicatory system. The Sebben respondents' prediction that initial reviews can be conducted quite expeditiously (Br. 46 n.87) is based on the Labor Department's performance in the wake of the 1978 amendments when Congress, after ordering reopening of numerous claims, appropriated funds for 564 new staff positions, 453 of which were four-year appointments. See Secretary of Labor, *Annual Report to Congress on the Black Lung Program* 6 (1977).

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IN THE

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OCTOBER TERM 1987

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Petitioners,

v.

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ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Amici curiae,[1] the American Insurance Association, Alliance of American Insurers, National Association of Independent Insurers and the National Council on Compensation Insurance, respectfully request that the decision of the United States Court of Appeals for the Eighth Circuit entered on March 25, 1987, and

1. In accordance with Rule 36.1, the written consent of the Pittston Coal Group, *et al.*, the Solicitor General, James Sebben, *et al.*, and Charlie Broyles, *et al.*, are submitted herewith.

the decision of the United States Court of Appeals for the Fourth Circuit entered on July 31, 1987, be reversed by this Court.

INTEREST OF AMICI

The American Insurance Association ("AIA"), the Alliance of American Insurers ("Alliance") and the National Association of Independent Insurers ("NAII") are separate, independent, not-for-profit insurance industry trade associations. Their collective membership includes more than 850 insurance companies and their subsidiaries. Member companies write more than 85% of the premium dollar volume of workers' compensation insurance coverages sold in the United States. Members within each association directly provide coverage to coal mine operators for claim liabilities arising under the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1982) (the "Act").

AIA, Alliance and NAII member companies also provide a wide variety of property-casualty and general liability lines of insurance to commercial enterprises throughout the United States. These amici represent the interests of their members in matters of special concern to the commercial liability insurance industry. Many AIA, Alliance and NAII members have a direct substantial economic stake in the outcome of this litigation. Perhaps, even more importantly, the circumstances that give rise to these appeals pose difficult and troubling questions that go to the very heart of the ability of the insurance industry to respond in the future to commercial insurance risks created by the Congress and federal agencies.

The National Council on Compensation Insurance ("NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes more than 700 insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout most of the United States. In thirty-five states, including most major coal mining states, NCCI collects data and develops premium rates and rating plans for workers' compensation insurance. NCCI also manages various

workers' compensation assigned risk plans and the National Workers' Compensation Reinsurance Pool (the "Pool"). Pool members reinsure among themselves several categories of risk that arise under the Act. In particular, the Pool is the only commercial vehicle available to small or high-risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from a state fund or insurance carrier. Most of NCCI's members and many AIA, Alliance and NAII members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, 15% to 20% of all federal claim liabilities are insured or reinsured by the Pool. Approximately 50% of federal black lung liabilities that may be allocated to an individual mine owner are commercially insured.[2] The companies and competitive state insurance funds represented by all amici account for more than 98% of the premium dollar volume of all U.S. workers' compensation coverages, including those available under the federal black lung program.

In black lung claims the insurer is a party to the litigation and, as such, participates directly on behalf of its insured. 20 C.F.R. § 725.360(a)(4); *Warner Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 804 F.2d 346 (6th Cir. 1986). In this capacity, the insurance carrier hires defense counsel and bears the cost of claim litigation and administration.

The commercial liability insurance industry has a direct, immediate and substantial interest in the outcome of this litigation.

2. Liability arising out of claims in which the miner was last employed prior to January 1, 1970, and certain uninsured liabilities are paid by the Black Lung Disability Trust Fund. 30 U.S.C. § 934(a). The Trust Fund is financed by a producer tax on coal. 26 U.S.C. § 4121.

STATEMENT OF THE CASE

A. History

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, to improve safety conditions in U.S. coal mines and reduce the exposure of coal miners to hazardous dust produced in mining operations. In response to a generally correct perception that miners affected by coal-dust related disease ("pneumoconiosis" or "black lung" disease) had been unable to obtain benefits under state workers' compensation laws, the 1969 Act also included among its provisions a separate Title IV to establish a temporary[3] federally financed black lung remedy for miners and their families.

The program contemplated an open filing season for claims terminating on December 31, 1972, and the eventual correction of inadequacies in state workers' compensation laws. 83 Stat. 795. During the initial period, claims were to be filed with, adjudicated and paid by the Secretary of Health, Education and Welfare, employing the resources of the Social Security Administration ("SSA"). Benefits awarded were to be paid by the U.S. Treasury, and claims were to be decided under the eligibility rules and adjudication procedures of sections 205 and 223(d) of the Social Security Act, 42 U.S.C. §§ 405, 423(d), *incorporated by reference into* 30 U.S.C. §§ 902(f), 923(b). The SSA portion of the program was called "Part B." 30 U.S.C. §§ 921-925.

After the termination of Part B, it was anticipated that all new claims would be filed under applicable state workers' compensation laws. *Id.* § 931. In recognition of the possibility that all states might not have had an adequate state law in place by 1972, the original Act contemplated the extension of the federal program to 1976. It provided that a miner residing in a state not having an adequate workers' compensation law could file a claim with the Secretary of Labor under a new program called "Part C." Part C claims were to be filed with the Secretary of Labor and adjudicated under the adversarial litigation provisions of the

3. The original program was to expire in its entirety on December 30, 1976. 83 Stat. 796.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-952, *incorporated by reference into* 30 U.S.C. § 932(a). Part C claims were to be funded by mine owners. Mine owners were directed either to self-insure this risk or purchase commercial insurance. 30 U.S.C. § 933.

The original black lung Act contained four eligibility rules: (1) total disability was to be determined on the basis of medical criteria not more restrictive than those applied under 42 U.S.C. § 423(d); (2) an occupational cause could be rebuttably presumed if a miner with ten or more years of exposure had pneumoconiosis; (3) death due to pneumoconiosis could be rebuttably presumed if the miner had ten years of exposure and died due to a respiratory disease; and (4) a mandatory inference required the payment of benefits to any miner suffering from the most advanced stage of black lung disease. 30 U.S.C. §§ 921(c), 923(b). These provisions applied to both Part B and Part C claims. 83 Stat. 797.

In 1972, Congress amended the law in several respects. Black Lung Benefits Act of 1972, 86 Stat. 150. The most significant thing that happened in the 1972 legislative process produced no statutory amendment. Rather, in a Senate Report, SSA was directed to write regulations containing "interim evidentiary rules and disability evaluation criteria" to ensure the prompt processing and payment of SSA claims. S. Rep. No. 743, 92d Cong., 2d Sess. 16, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23. Whatever the Senate Committee meant by this is not on the public record, but in hindsight it is apparent that several key members of Congress simply wanted SSA to pay most claims whatever their merits. *See* Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 92 (1985) (noting, "SSA officials working closely with the members of the Committee staff developed a strategy for implementing the amendments that would allow SSA to pay most of the claims. The essential element of that strategy was some seemingly innocuous language added to the committee report.").

In response, SSA published a rule popularly known as the "interim presumption." It could not be applied to Labor Department claims. 20 C.F.R. § 410.490 (1987). After a brief comment period, SSA began to apply the rule. The rule itself was designed without input from SSA's medical staff[4] and implemented without public input. Since it had no application to mine owners and reflected only the private arrangements between SSA and its congressional overseers, the implementation of the rule went largely unnoticed. To this day, there is no way of knowing how SSA applied its rule.[5] The language of section 410.490 is duplicative and ambiguous and all that is certain is that it produced awards. It is not surprising that in congressional hearings from 1973 to 1975 the Labor Department noted that the inapplicability of section 410.490 was a major reason why Labor was unable to approve as many claims as had SSA. *See Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 49 (1977).

When in the late 1970s it was resolved again to amend the Act, the House of Representatives settled upon several amendments that would have changed the character of the Labor program to make it more like SSA's, and to facilitate results in claim determinations that approximated SSA's experience. The House had been told that SSA's presumption could not be constitutionally applied in litigated claims involving mine owners.[6] To overcome

4. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, Social Security Administration).

5. *See* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues*, 83 W. Va. L. Rev. 869, 897 (1981) (observing "it must be understood that the SSA and Labor versions [of the interim presumption] . . . can be contrasted in the hypothetical only. An attempt at explaining how SSA applied the interim presumption . . . would be to engage in speculation, at best.")

6. *See* H.R. Rep. No. 770, 94th Cong., 2d Sess. (1975), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st. Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979).

this obstacle and to implement still further liberalizations of entitlement rules of questionable scientific merit, the House enacted a bill that would have eliminated mine owners' rights to contest claims yet retaining their obligation to finance benefits. This scheme would have created several new "irrebuttable" presumptions, would have left SSA with sole authority to write eligibility regulations, and would have required application of "criteria" no more restrictive than SSA's, as a last resort, in the consideration of Part C claims. H.R. 4544, 95th Cong., 1st Sess. §§ 2, 8, 9 (1977).

The Senate took a more moderate course that retained the essential characteristics of Part C as a workers' compensation program, eschewed the extravagant eligibility rules proposed by the House, and directed the Secretary of Labor to write medically sound eligibility rules. S. 1538, 95th Cong., 1st Sess. (1977). Although the final bill conformed for the most part to the Senate proposal, the compromise reached retained two key House provisions. All previously denied claimants were to have their claims reviewed either automatically (Part C claims) or at the claimant's option (Part B claims), and criteria no more restrictive than those applied before July 1, 1973, by SSA were to apply under Labor Department rules to all reviewed claims and a limited category of new claims. 30 U.S.C. §§ 902(f)(2), 945.

In keeping with this directive, Labor promulgated its version of the interim presumption. 20 C.F.R. § 727.203 (1987). Labor's rule differs from SSA's. Both rules establish a rebuttable presumption of eligibility for benefits under the Act. The Labor presumption is more easily invoked in most cases, except that a miner with less than ten years of coal mine employment and positive x-ray evidence is permitted to invoke SSA's rule but not Labor's. Labor's presumption is rebuttable but, according to the circuits, SSA's is not generally rebuttable. Section 410.490 is rebutted only if the miner "is either doing or capable of doing his usual coal mine work" whether or not the inability to work is

black-lung related. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *cert. granted*, 108 S. Ct. 1288 (1988). "Section 410.490 cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). By contrast, the Labor Department's presumption may be rebutted by the defendant if the relevant medical proof establishes that the miner is not totally disabled by, or does not suffer from, or did not die due to black lung disease. 20 C.F.R. § 727.203(b); *see Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 432 (1987). Section 410.490, as it has been interpreted, provides benefits whether or not a miner's absence from the workplace is caused by black lung disease, and in some instances, whether or not the miner actually suffers from this occupational disease. *See Cook*, 816 F.2d at 1185; *compare* 20 C.F.R. § 410.490(c) *with id.* § 727.203(b).

These differences notwithstanding, Labor obtained pre-publication clearance for its rules from the leadership of the House Committee on Education and Labor that had so aggressively pursued an SSA-like entitlement scheme. *See* Letter from Representatives Perkins, Dent and Simon to Robert B. Dorsey, U.S. Department of Labor (May 25, 1978). The Labor rules were published for comment and promulgated without change in August 1978. 43 Fed. Reg. 36,825-26 (1978). From the beginning, section 727.203 was consistently applied by the Labor Department to require ten years of coal mine employment for its invocation and to permit the rebuttal of presumed facts.

The series of cases that resulted in these appeals questions whether Labor was authorized to write a rule that did not produce the same result as section 410.490. In *Broyles*, the Fourth Circuit held that Labor was not so authorized and the court directed the Secretary to apply section 410.490 in pending Labor Department claims.[7] 824 F.2d at 329. In *Coughlan* v. *Director, Office*

7. The Seventh Circuit disagreed with the Fourth Circuit's conclusion, finding the Labor rule valid. *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987); *Taylor* v. *Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1720). The Third Circuit finds the Labor rule invalid. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987). The Sixth Circuit agrees that the Labor ten-year rule is invalid, but permits rebuttal by the Labor formula. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3643, 3484 (U.S. Dec. 21, 1987) (Nos. 87-1045, 87-1065).

of Workers' Compensation Programs, 757 F.2d 966 (8th Cir. 1985), the Eighth Circuit had reached the same conclusion as the Fourth Circuit. Then, in *Sebben* v. *Brock*, the Eighth Circuit ordered the Secretary of Labor to reopen and readjudicate under the SSA rule all of the claims subject to an interim presumption that were previously denied by Labor.

Available data indicate that 155,000 claims are potentially affected by the decision in *Sebben*, of which 94,000 involve miners with fewer than ten years of coal mine employment.[8] Insurance industry actuaries estimate that the combined effect of *Sebben* and *Broyles* will add from three billion dollars to six billion dollars or more to the aggregate liability of the Black Lung Disability Trust Fund, employers and their insurance carriers.[9] The cost of readjudication would range from two hundred million to four hundred million dollars.

8. *See* Petition for a Writ of Certiorari filed by the Solicitor General in No. 87-827 at 11; *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office, Sam Church, Jr., President, United Mine Workers of America, and Charles Coakley, AIA).

9. The rationale for this conclusion includes a number of variables. The non-rebuttability of section 410.490 is a major factor. The inability or unwillingness of the Department of Labor to vigorously defend claims is another. *See* Comptroller General of the United States, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (1982). There are many others as well, including the fact that each reopened claim would involve a new trial with new evidence and a much older miner. Since pulmonary capabilities diminish with age, many claimants would be able to establish the interim presumption simply by having grown older. *See supra* note 4 (testimony of Dr. Harold I. Passes).

B. Insurance Industry Involvement

Insurance carriers called upon to underwrite the federal black lung risk have always faced difficult challenges. The coal industry, unlike some other major industrial sectors of the economy, is composed of thousands of mostly small producers. Most of these companies would have no financial ability to pay or even defend a single claim, the cost of which averages from $118,315.88 for a claimant without dependents to $185,659.69 for a married miner. Costs can go much higher. *See* U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981).

Workers' compensation insurance, unlike most commercial lines, cannot limit the maximum liability of the carrier. If a carrier offers workers' compensation coverage, it must provide full coverage for the insured employer's statutory workers' compensation liability, come what may, in order for the employer to comply with mandatory insurance requirements imposed by state workers' compensation laws.[10] Under laws regulating the business of insurance, retroactive adjustment of workers' compensation premium rates to cover losses generated by the insurance carriers' miscalculations of the cost of a risk is impossible. The entire estimated cost of insuring a risk is fixed at the time a policy is sold and, when an occupational disease claim is filed, it attaches to the policy in effect at the time of the worker's last employment. *See* 20 C.F.R. § 726.203. Premiums collected for that policy must cover all claims attributable to that policy. Premiums charged for policies in future years are not and cannot be calculated to pay the cost of previously incurred claims.

For these reasons, workers' compensation insurance premium ratemaking has evolved into an exacting science. Predictability, certainty, and a careful evaluation of potential risks are critical features of this very complex process. Pooling arrangements,

10. State insurance officials regulate insurance premium rates and policy provisions. In workers' compensation lines of coverage, the carrier must provide full coverage for all insured employers. The Act contemplates the regulation of rates and coverages for the federal program by state agencies. 30 U.S.C. § 933(a).

like the National Workers' Compensation Reinsurance Pool, are essential to accommodate otherwise uninsurable employers. To avoid catastrophic unfunded losses, industry specialists devote great care to reach an understanding of the nature of the risk to be insured. Sometimes errors are made, and the carriers and pools are answerable when that occurs.[11] That is to be expected and is simply a reality of the insurance business.

What makes this case different, and the result that would flow from *Sebben* exceptionally inequitable, is that the workers' compensation insurance industry was not asked to, did not, and would not have insured the risk created by the SSA presumption. That risk has little or no relationship to total disability or death due to black lung disease. The SSA provision, by its plain language, compensates unemployment, disabilities whatever their cause, retirement and old age. The workers' compensation insurance industry wrote no policies, collected no premium and had no basis on which to ascertain that, in writing a workers' compensation insurance policy covering mine owners, it was insuring the life and health of all coal miners. If *Sebben* and *Broyles* are correct, this industry, the coal industry, the Department of Labor, energy and insurance consumers and probably most of the members of Congress itself have been the victims of an atrocious delusion.

SUMMARY OF ARGUMENT

The decisions of the Fourth and Eighth Circuits operate in concert to redesign the fundamental concept of the Department of Labor's black lung program. Together they require the insurance industry, and to a much larger degree, the coal industry, to fund benefits to coal miners that are in no way justified. The benefits are called "black lung" benefits, but even a cursory review of the two regulations at issue, the SSA rule and the Labor rule, reveals that the latter may involve compensation for black lung disease, but the SSA rule does not.

11. If errors are made in favor of the industry, future rate calculations must reflect an appropriate adjustment.

We believe that Congress intended this important difference between the two programs. But the words used to convey this intent in the statute and its legislative history lack precision. The legislative context is ambiguous, perhaps by design. In attempting to structure a black lung workers' compensation program in keeping with Congress's intent, the Department of Labor developed an eligibility regulation in section 727.203 that is likely to be the most plaintiff-favorable-burden-of-proof-shifting vehicle ever designed by a federal agency for adversary litigation. But in doing so, Labor opted to maintain some scientific validity in its standard and permitted claim defendants the opportunity to prevail in a non-meritorious claim. The Secretary of Labor's perception of the agency's mission is entitled to deference, and the agency's rule should be sustained. Section 410.490 is a private rule with a hidden purpose and has no place in the Part C black lung program. Under the SSA rule, proven facts do not produce a factually true inference of a claimant's right to benefits, and presumed facts are essentially irrebuttable. Section 410.490 violates the Due Process Clause of the Fifth Amendment to the United States Constitution for this reason.

The Eighth Circuit's decision mandating the relitigation of tens of thousands of closed cases is not authorized by any source of law. The Longshore Act precludes the exercise of jurisdiction over claims outside of prescribed statutory procedures. Longshore procedures are preemptive and the pursuit of the remedies they provide is mandated for any party seeking relief from a black lung claim determination. The procedures reflect the principle of res judicata, and res judicata applies to completed adjudications in black lung claims, including those claims in the *Sebben* group.

The decisions below will so enormously disrupt the continuation of this important federal program and produce such completely unjustified liabilities for the insurance industry and the coal industry that they must be reversed. In both *Sebben* and *Broyles*, the circuits have committed error in need of expeditious correction.

ARGUMENT

I.
CONGRESS NEITHER REQUIRED NOR INTENDED TO REQUIRE THE LABOR DEPARTMENT TO APPLY THE SSA RULE

This case turns on the validity of the Department of Labor's regulation. If in requiring ten years of employment and permitting rebuttal in 20 C.F.R. § 727.203, the Secretary of Labor acted reasonably and in accord with the Act, the inquiry in these cases is fully answered. *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To sustain the rule, the agency must articulate its reasons for acting as it did. If these reasons are consistent with the Act and in accord with its purposes and if the result is not arbitrary, the rule is valid. *See NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987). Where ambiguity deprives the statutory language of undeniable meaning, this Court typically defers to the agency's interpretation, so long as the interpretation is permissible and does not lead to an arbitrary and capricious result. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, both courts below began and ended their analyses with the term "criteria" in section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), finding in it an unambiguous intent on the part of Congress to require Labor to apply the SSA rule. The Department of Labor has consistently interpreted "criteria," in its statutory context, to have a more limited meaning. Although the plain meaning of the term is large and loose, there are indications in the statute and legislative history that it had a fairly specific meaning for congressional drafters, which was properly ascertained by the Secretary of Labor.

All related sections of the Act should be interpreted as a part of an harmonious whole. *See Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 614-17 (1944). The Act, as a whole, gives the Secretary of Labor broad regulatory authority to define the elements of entitlement to benefits. 30 U.S.C. §§ 902(f)(1),

932(c), (h), 936(a). Section 902(f) addresses only those standards that relate to the definition of "total disability," *and within that limited context* the SSA rule permits an inference of "total disability" if the specified medical criteria are met, *i.e.*, positive x-ray, autopsy, or biopsy evidence demonstrating occupational pneumoconiosis or ventilatory test results at a specified level. 20 C.F.R. § 410.490(b). Whether an x-ray, autopsy or biopsy actually shows pneumoconiosis is not related to the issue of total disability. It is a mixed question of causation that requires the expert interpretation of medical tests. The Secretary is independently authorized to regulate concerning causation in 30 U.S.C. § 932(h) and to regulate concerning medical tests in 30 U.S.C. §§ 902(f)(1)(D) and 923(b). Whether this separate regulatory authority is overridden by section 902(f)(2) is ambiguous.

The term "criteria" itself is also used at two other places in section 902(f). Section 902(f)(1)(C) employs similar language to that used in section 902(f)(2): "regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act." 30 U.S.C. § 902(f)(1)(C). Typically, SSA disability "criteria" consist of listings of medical test results giving rise to an implication of total disability. *See* 20 C.F.R. Part 404, subpart P, app. 1 (1987). Also, 30 U.S.C. § 902(f)(1)(D) uses the term "criteria" to refer to "medical tests."

It is also significant that the plain language of section 410.490 is inconsistent with several provisions of the Act. Section 401(a) of the Act states that the purpose of the Act is to provide benefits for total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). Section 410.490 provides benefits far beyond that premise. Section 413(b) of the Act requires the consideration of all relevant medical evidence in claim litigation. 30 U.S.C. § 923(b). Section 410.490 renders such evidence irrelevant. Section 402(f)(1)(A) of the Act directs the Secretary of Labor to define "total disability" to permit an award only when "pneumoconiosis" prevents the miner from working. 30 U.S.C.

§ 902(f)(1)(A). Section 410.490 makes pneumoconiosis irrelevant to the miner's eligibility in many cases.

These references demonstrate in this exceptionally complex regulatory environment that the mandate of section 902(f)(2) is less than crystal clear. For this reason, and perhaps more importantly because of the exceptional controversy that characterized the debate over the interim presumption, consultation with external authorities, including the legislative and regulatory history of the matter, is compelled.

If Congress meant in section 902(f)(2) that the Secretary of Labor was to repromulgate the SSA regulation or adopt all of its provisions as a starting point, it chose very curious language to convey that message. What is more likely is that the Secretary of Labor was given a mandate to regulate in light of a broadly defined set of congressional expectations, and was aware that the regulations would be informally reviewed by the most interested members of Congress before publication.[12]

As an academic exercise in interpretation, the legislative history and circumstances surrounding publication of the Labor rule present many difficulties. Enlightenment and clarity are elusive. The Solicitor General and the parties will surely survey the many legislative references and extract meaning from them. All that seems certain is that the Secretary of Labor was to write a separate rule and that the Secretary was compelled to include within that rule provisions allowing rebuttal. H.R. Rep. No. 864, 95th Cong., 2d Sess. 13, 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309; 124 Cong. Rec. 2333, 3426, 3431 (1978). It was also understood that Labor was authorized to depart from the SSA usages to some significant degree. *Id.* Whether Labor's departure, particularly with respect to the ten-year x-ray invocation standard,[13] overstepped the Act or the bounds of reason is not

12. That this procedure was followed is well documented. *See* Solomons, *supra* note 5, at 896-97 & n.138; Letter from Representatives Perkins, Dent and Simon to Robert B. Dorsey, *supra* p.8.

13. On the matter of rebuttability, all sources of authority point to the conclusion that Labor was required to permit rebuttal of presumed facts. Although *Broyles* holds to the contrary, its holding is devoid of rationale, and there is none.

an answerable question within the language of the Act or the legislative history.

In this setting, judicial deference is required if Labor is able to explain its decision. Labor asserts that the word "criteria" in section 902(f)(2) means only medical criteria as distinct from "evidentiary standards." Additionally, miners with fewer than ten years of exposure do not; as a medical matter, contract disabling black lung disease and it is unreasonable to so presume. Perhaps the ten-year standard was employed to screen in the claimants most likely to be deserving and to impose a higher standard of proof on the others. Perhaps Congress left to the Secretary the discretion to compromise the demands of those few members of Congress with a "pay everybody" philosophy with the more moderate views of other members. Certainly, the Secretary's duty to factor in the rights of claim defendants also played a role.

In the aggregate, these reasons support the Secretary's exercise of discretion and validity of the rule. The deference equation requires no more, and here a traditional inquiry sustains the rule. *See American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 514 (1981).

The insurance industry's contribution to this debate arises from our long-standing perception that Congress and the Department of Labor harbored no intent to lure the industry into writing insurance coverage for an uninsurable risk. Total disability or death due to black lung disease is an insurable risk. The unemployment, general disability, retirement or death of coal miners, within the guise of a workers' compensation program, is not. The history of the insurance industry's involvement demonstrates special concern for insurability and strongly supports the Government's understanding that in designing section 727.203, the agency was required to preserve some measure of fairness for the private parties involved.

Mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, but the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by

the Department of Labor and asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[14] Given repeated assurances by the Department and Congress during the period from 1973 to the present day that the black lung claims process would, notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, the insurance industry provided coverage at affordable rates.

Following liberalizations of entitlement rules in the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and largely because of section 727.203, it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[15] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 16, 30 (Comm. Print 1981); *see also* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing ... this

14. *Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

15. This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635. But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 30 U.S.C. § 934. The Fund is currently more than $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

retroactive liability. . . . [T]he combined effect of the 1977 law requiring the automatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

The partnership between Congress, many federal agencies and the commercial liability insurance industry is pervasive. This industry is called upon frequently to assist Congress in the implementation of national policies by providing private parties the insurance coverage they need to be in compliance with federal laws.[16] In order for this partnership to be maintained, there must be an acceptable level of predictability and stability in the risks Congress creates. The partnership cannot survive if the industry is considered merely an adjunct to the Federal Treasury whenever Congress decides to be more generous, but does not want to pay the cost of its largess. Congress is well aware of this fact. It is unimaginable that Congress would, in the black lung program, ask the insurance industry to fund a compensation scheme based on the SSA presumption. It is equally improbable that Congress would do so without clearly expressing such intent.

When Congress liberalized the Act in 1978, most of the claims here in question were already insured under preexisting insurance policies. Those policies provided coverage only for total disability or death due to black lung disease and they cannot be rewritten. There is no proof that the 1978 amendments would rewrite these policies to require payment for unexpected and unknown risks wholly divorced from the stated purpose of the Black Lung Act. *See* 30 U.S.C. § 901(a) ("It is, therefore, the purpose of this title to provide benefits, in cooperation with the states, to coal

16. Just a few examples are the Longshore Act, 33 U.S.C. § 932; the Price-Anderson Act, 42 U.S.C. § 2210 (nuclear plant accidents); 42 U.S.C. §§ 5154, 5172 (nuclear disaster relief); 7 U.S.C. § 1503 (crop insurance); 33 U.S.C. § 1321(d), (p) (maritime disasters); 30 U.S.C. § 1257 (surface coal mining operations); 41 U.S.C. § 351 (government contractors); 46 C.F.R. § 540.20 (1987) (cruise ships); 14 C.F.R. Part 205 (1987) (air carriers).

miners who are totally disabled due to pneumoconiosis, and to the surviving dependents of miners whose death was due to such disease. . . .")

In sum, there are many sound reasons why the Secretary of Labor constructed section 727.203 as he did, not the least of which is that the benefit-funding mechanisms available and the rights of claim defendants deserved protection.

II.

THE SSA RULE WOULD DEPRIVE CLAIM DEFENDANTS OF RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT AND OF DUE PROCESS OF LAW

The Black Lung Benefits Act provides that the regulations of the Secretary of Labor "shall be issued in conformity with" 5 U.S.C. § 553. 30 U.S.C. § 936(a). Only the Secretary of Labor is authorized to promulgate regulations governing the consideration or disposition of claims adjudicated by the Department of Labor. *Id.; see id.* §§ 902(f)(1), 932(h). Section 410.490 Labor was neither published by the Secretary of Labor nor was it ever placed in the public domain for participation and comment as a rule affecting the rights of private parties. No argument can be made that any interim presumption is merely a statement of agency policy or that it fits any of the exceptions to 5 U.S.C. § 553.

Neither court below had authority to promulgate section 410.490 for Labor Department claims. The procedures set forth in 5 U.S.C. § 553 are there to protect members of the public from arbitrary rulemaking practices and to ensure that rules adopted by an agency reflect a proper and careful deliberation of competing views. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978); *FCC* v. *Schreiber*, 381 U.S. 279, 290-92 (1965). The courts may not simply step in to accomplish what the agency is prohibited from doing. *See Heckler* v. *Lopez*, 463 U.S. 1328, 1333-34 (1983);

Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77, 97 (1981).

Yet, this is precisely what the Fourth Circuit and the Eighth Circuit have done. It is not valid rulemaking and should not be sustained by this Court.[17]

Economic regulatory legislation will rarely succumb to challenge under the Due Process Clause. This Court has afforded Congress considerable leeway in regulating our national economic life. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). But if, in fact, 30 U.S.C. § 902(f)(2) requires application of the SSA regulation to the private liability of mine owners and their insurers, the minimal rationality required by the Due Process Clause is hard to find. The right to a fair hearing compelled by the Due Process Clause is similarly difficult to discern.

Section 410.490 is, from everything that is apparent, designed to require the payment of black lung benefits to coal miners and their families whether or not the miner has black lung disease or any disability from that disease. *See* Comptroller Gen. of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 8 (1980) (reporting that "in 88.5% of the [SSA] cases, medical evidence was not adequate to establish disability or death from black lung"). Section 410.490 erects a mandatory inference that the miner is totally disabled or died due to black lung disease on the basis of proof that is barely connected to either ultimate fact, if it is connected at all. *See supra* pp. 5-6.

The mine owner or its insurer is afforded a right to a hearing, but at that hearing cannot prevail by proving the falsity of presumed facts. The plain language of section 410.490 so provides, and the courts have been assiduous in acknowledging the exceptionally limited rebuttal possibilities provided. 20 C.F.R.

17. Were this Court to agree that section 727.203 is unduly restrictive and remand the matter to the Labor Department for rulemaking, a curious phenomenon would ensue. In a rulemaking proceeding, the Department will not be able to make a credible record supporting its adoption of section 410.490. The simple truth is that proof of invocation of section 410.490 cannot support the inference of ultimate fact it mandates. A subsequent challenge to section 410.490 would prove the rule to be arbitrary and capricious.

§ 410.490(c); *Broyles*, 824 F.2d at 329; *Haywood* v. *Secretary of HHS*, 699 F.2d 277, 283 (6th Cir. 1983) (both noting that section 410.490 may be rebutted only by proof that the miner is working or able to work). Section 410.490 provides no method of rebuttal at all if the miner is deceased. Thus, the survivor of a deceased miner who had perfectly normal ventilatory test results (*see supra* p. 6) is accorded a mandatory inference that death was due to pneumoconiosis and automatic entitlement to benefits under section 410.490. Again, the plain language of section 410.490 so provides. 20 C.F.R. § 410.490(c).

There is no rationality here. Application of section 410.490 would be a taking of the property of mine owners and insurers without due process of law.[18] It would be an outright sham and should not be tolerated under the Constitution. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brick Co.*, 455 U.S. 422, 433 (1982); *see also Brock* v. *Roadway Express, Inc.*, 107 S. Ct. 1740, 1749 (1987). Section 410.490 clearly abridges these rights.

III.
THE REOPENING OF CLOSED CASES IS BARRED BY THE LONGSHORE ACT AND BY THE RULE OF RES JUDICATA

Longshore Act procedures govern the adjudication of Department of Labor black lung claims. 33 U.S.C. §§ 919, 921, *incorporated by reference into* 30 U.S.C. § 932(a); *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977). Longshore Act procedures are exclusive, and the time limits fixed by the provisions of the Longshore Act for the pursuit of both administrative and judicial remedies

18. For insurers, section 410.490 would have the additional impact of retroactively rewriting the insurance contracts entered into with mine owners. These contracts provided no coverage for non-occupational conditions or disabilities. This feature of section 410.490 casts further doubt on the constitutional validity of the SSA rule if applied in Part C cases. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 16-17.

are jurisdictional. 33 U.S.C. § 921(a), (c). *Crowell* v. *Benson*, 285 U.S. 22, 49-53 (1932); *Louisville & N. R.R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 244 (1977).

The Longshore Act requires reversal of the Eighth Circuit's decision in *Sebben*. Where Congress establishes a comprehensive procedure for the adjudication of a particular class of cases, "those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965); *cf. United States* v. *Fausto*, 108 S. Ct. 668, 675 (1988) (Congress may withdraw the right to judicial review of administrative action). Longshore Act procedures are comprehensive and exclusive. Section 21(e) of the Longshore Act provides that proceedings for the consideration of a denied claim "shall not be instituted otherwise than as provided in" the Longshore Act. 33 U.S.C. 921(e).

The *Sebben* plaintiffs[19] seek to bypass this prohibition. There is no showing that pursuit of the statutory remedies provided would have been futile, and indeed the circuit court decisions now before this Court demonstrate that the pursuit of statutory remedies would not have been futile. No argument can be made that this dispute over interim presumptions in any way involves the constitutional rights of black lung claimants. No claim can be made that the identity of the correct eligibility standard is beyond the jurisdictional purview of the Benefits Review Board or certainly the circuit courts. The Longshore Act unambiguously provides that there is only one way to adjudicate black lung claims, and that avenue prohibits alternative access to the district

19. Many within the putative *Sebben* class, including the class representatives, failed to exhaust their administrative remedies. This failure generally precludes the exercise of mandamus jurisdiction under 28 U.S.C. § 1361 by the district courts in a collateral action. *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984).

courts.[20] Were that not the case, the rule of res judicata is still properly applied in this administrative setting.

This Court has observed that the application of res judicata in civil litigation is not a matter of discretion for the federal courts. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401-02 (1981) (citation omitted). In an administrative setting the rule of res judicata should be applied where the agency acts in a judicial capacity and the parties have had a fair chance to litigate. *University of Tenn.* v. *Elliott*, 106 S. Ct. 3220, 3226 (1986); *see also* Restatement (Second) of Judgments § 83, at 269 (1982). Where the rights of private parties are litigated in a proceeding governed by the Administrative Procedure Act, 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d), application of res judicata is particularly appropriate.

Black lung claim adjudications have all of the essential attributes of a civil trial for damages. It is difficult to discern a reason why res judicata should not apply. From the insurance industry's perspective, res judicata and finality are key elements of a fair hearing. Without these features, predictability and thus insurability become elusive. The insurance industry, including state insurance funds, cannot be expected to participate in the funding or financial management of open-ended federal welfare or entitlement programs, and there is no indication that Congress intended it to do so in the Part C portion of the black lung program. When Congress reopened previously denied claims in the 1977 amendments to the Act, it also transferred all liability for claims predicated upon coal mine employment terminating before January 1, 1970, to the Black Lung Disability Trust Fund, thus mitigating the inherent unfairness of once waiving res judicata. *Compare* 30 U.S.C. § 932(c) *with* 83 Stat. 796. When the 1978 funding formulation proved unfair, Congress again corrected funding

20. This also precludes the Eighth Circuit's reliance on 28 U.S.C. § 1361 as a jurisdictional predicate for action.

inequities. 30 U.S.C. § § 902(i), 932(j).[21] The Eighth Circuit has no capability of funding its decision, and it does not share Congress's power to waive finality whenever the court perceives that equities so require. Res judicata applies to protect the rights of all parties, and its application is essential here.

The Eighth Circuit's reliance on *Bowen* v. *City of New York*, 106 S. Ct. 2202 (1986), is not justified. The result in *Bowen* draws rationale from specific provisions of the Social Security Act permitting a waiver of time limitations and from the exceptionally unfair actions of SSA in deciding cases under a secret rule. Neither feature of *Bowen* is even arguably present in this case. The Longshore Act permits no waiver of time limitations and there was nothing hidden in Labor's application of its regulation.[22] *Bowen* speaks not at all to the application of res judicata in the instant setting.

21. These corrections, of course, only shift liability to the coal industry as a whole, which must fund the added obligations of the Trust Fund.

22. If anything was clandestine, it was SSA's development of section 410.490. If any precedent can be drawn from *Bowen* for application in this case, it is that the private arrangement between SSA and congressional staff that generated section 410.490 invalidates any application of that rule to the detriment of private parties.

CONCLUSION

For these reasons, the decision of the Fourth Circuit and the decision of the Eighth Circuit must be reversed.

Respectfully submitted,

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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Unless reversed, the decisions before this Court in the instant proceeding may force the coal industry to accept *all* liability for thousands of black lung claims reopened by the 1977 amendments to the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, and may remove the defensive rights secured by the Black Lung Benefits Act and this Court in *Mullins Coal Co., Inc. of Virginia* v.

1. Pursuant to Rule 36.2, written consents from counsel of record for all parties to these consolidated proceedings are being filed with the Clerk of this Court with this Brief.

Director, OWCP, 108 S.Ct. 427 (1987) ("Mullins") (interpreting the U.S. Department of Labor ("DOL") rules in 20 C.F.R. Part 727, which implement the 1977 amendments) and *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding the constitutionality of the 1969 and 1972 versions of the Black Lung Benefits Act presumptions and evidence rules against challenges by the coal industry).

The National Coal Association ("NCA") is a trade association representing coal mine operators who produce over sixty-five percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. §§ 931-945 (the "Act"), in two direct ways: (1) as individual coal mine operator defendants[2], 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust fund ("BLDTF"), 26 U.S.C. § 4121. Revenues collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. § 9501(d)(5). The BLDTF also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the

2. Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

The tax paid by coal producers into the BLDTF, augmented by two tax increases,[3] is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $3.975 billion in tonnage taxes from coal producers since 1978.[4] In fiscal year 1987, the nation's coal producers paid $572,295,000 into the BLDTF in tonnage taxes.[5] But the BLDTF has paid out over $5.54 billion in compensation since 1978,[6] and in fiscal year 1987, disbursed $605 million in compensation.[7] In order to meet the continuing shortfall between compensation levels and BLDTF revenues, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. As a result, the BLDTF currently owes the U.S. Treasury nearly

3. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986) [hereinafter cited as 1986 Budget Reconciliation Act]. Congress provided that the 1981 tax increase was temporary, and that the producers' tax would revert to lower, 1978 rates by January 1, 1996, or when the BLDTF was no longer in debt to the U.S. Treasury for repayable advances or interest, whichever occurred first. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 §102(a), 95 Stat. 1635 (1981); the 1986 Budget Reconciliation Act, Pub. L. No. 99-272, §13203(c), 100 Stat. 313. In 1987, the Administration proposed to increase the tax on producers yet a third time to raise $400 million in additional revenues. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988* at 2-41. Congress refused, instead extending the date for reversion of the current tax to the lower 1978 rate until January 1, 2014. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), *amending* 26 U.S.C. § 4121(e)(2).

4. U.S. Dep't of the Treasury, *Black Lung Disability Fund, Status of Funds* (Sept. 30, 1987) [hereinafter cited as *1987 Trust Fund Status Report*].

5. *Id.*

6. Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Dec. 7, 1987).

7. *1987 Trust Fund Status Report*, *supra* note 4. These disbursement figures do not include the cost of administering the program.

$3 *billion*.[8] In May 1988, the Secretary of labor requested an additional appropriation of $54 million to the BLDTF.[9]

The two decisions before this Court, *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987) (No. 87-1095) ("*Broyles*"), and *Sebben* v. *Brock*, 815 F.2d 475 (8th Cir. 1987) (Nos. 87-821 and 87-827) ("*Sebben*"), will have a dramatic impact on the coal industry. The coal industry's responsibility for black lung liability will be increased to intolerable levels if either or both cases are not reversed by this Court.[10] Under *Broyles*, employers will be forced to defend black lung claims under an exceedingly far-reaching entitlement presumption that precludes the defendant from challenging the medical bases for the presumption: the Social Security Administration "interim" adjudicatory rules at 20 C.F.R. § 410.490 ("SSA interim presumption"). These rules were never intended to apply to the workers' compensation portions of Part C of the Act and are virtually irrebuttable. Under *Sebben*, tens of thousands of finally denied and long-closed black lung claims will be reopened for relitigation under the SSA interim presumption.

The intolerable increase of unanticipated and unfunded liability which will result if *Broyles* and *Sebben* are not reversed will come at a time when the American coal industry can least afford it. NCA members are therefore critically interested in this Court's resolution of the important issues presented by these consolidated cases.

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8. *See supra* note 6.

9. *Hearings before the Subcomm. on Labor, Health and Human Service, Education and Related Agencies of the Senate Comm. on Appropriations*, 100th Cong. 2d Sess. 2 (Apr. 13, 1988) (statement of Ann McLaughlin, Secretary of Labor).

10. The Pittston Coal Group and its co-petitioners estimate that *Sebben* will burden the coal industry with as much as $13.6 billion in unanticipated and unfunded black lung liability. Petition for a Writ of Certiorari at 19, *Pittston Coal Group* v. *Sebben, petition for cert. granted*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988) (No. 87-821).

SUMMARY OF ARGUMENT

The process culminating in the adoption of the Department of Labor's interim presumption reflects a compromise between affordability to industry and generosity to miners. The DOL regulations promulgated as a result of this compromise are so liberal that they approach unconstitutionality, but are saved by retaining some basic concept of defensive rights.

The Fourth Circuit's effective elimination of rebuttal by replacing Labor's interim presumption with that of the Social Security Administration ("SSA") transforms the black lung program into a general disability scheme rather than workers' compensation. This action misinterprets Congress's mandate, upsets the balance of the competing interests involved and results in liability to private parties without due process of law.

The Eighth Circuit's directive to reopen tens of thousands of finally closed and denied Department of Labor claims for readjudication under SSA's presumption is devoid of any legal authority. It defies the plain language of the Longshore Act barring relitigation of closed claims and removing jurisdiction from district courts. It violates the rule of res judicata. And it does this in the context of private claims litigation at extraordinary expense to the coal industry.

NCA joins the federal and private petitioners in the consolidated cases in seeking reversal of both *Broyles* and *Sebben*.

ARGUMENT

I.

APPLICATION OF SSA'S INTERIM PRESUMPTION TO DEPARTMENT OF LABOR CLAIMS IGNORES FUNDAMENTAL DIFFERENCES IN THE NATURE OF THE PROGRAMS AND THE ROLE OF THE COAL INDUSTRY IN THE REGULATORY AND LEGISLATIVE PROCESS

Title IV of the Federal Coal Mine Health & Safety Act of 1969[11] is divided into two parts, Part B and Part C. Part B deals with claims filed on or before December 31, 1972, and is funded by general federal revenues. SSA was given responsibility to administer Part B claims.[12] Part C deals with claims filed after that time. Awards under Part C are the responsibility of mine operators. DOL was chosen to administer Part C claims.[13]

The Secretary of Labor was not authorized to write regulations defining total disability under the Federal Black Lung Act until Congress amended the Act in 1977. Under the original Act, only the Secretary of Health, Education and Welfare ("HEW")was authorized to promulgate regulations for determining whether benefits should be paid under the program. Congress originally directed that SSA's regulations were to be applied in Part C claims.[14]

SSA's administration of the program from 1969-1971 was criticized by certain members of Congress who felt that too few claims were being approved. S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2322-23. Out of the debates and discussions that culminated in

11. Federal Coal Mine Health and Safety Act of 1969, Pub.L. No. 91-173, § 411, 83 Stat. 792 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 823, 880-886 [hereinafter cited as the 1969 Act].

12. The 1969 Act, Pub. L. No. 91-173 §§ 411-414, 83 Stat. 792(1969). The 1972 amendments to the Act extended Part B to include claims filed on or before June 30, 1973. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 5, § 7, 86 Stat. 155-157 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 183, 189, 190, 192 (amending the 1969 Act, Pub. L. No. 91-173, § 414 and adding a new § 415).

13. The 1969 Act, Pub. L. No. 91-173 §§ 421-424, 83 Stat. 792 (1969).

14. The 1969 Act, Pub. L. No. 91-173 § 422(h), 83 Stat. 792 (1969).

1972 amendments to the Act, it became clear to SSA that it was to adopt a new, interim rule to "permit prompt and vigorous processing of the large backlog of claims. . . ." *Id.* SSA promulgated its interim presumption at 20 C.F.R. § 410.490(b) (1987) in response to the 1972 amendments. 20 C.F.R. § 410.490(a) (1987). This presumption applied only to Part B claims. 20 C.F.R. § 410.490(b) (1987).

Because Part C was intended to provide workers' compensation benefits for total disability due to coal workers' pneumoconiosis, and Part B was modeled after the SSA disability program, SSA resisted extension of its interim presumption to Part C claims.[15] SSA's interim presumption was also criticized for its lack of medical foundation.[16] The debate over the extension of SSA's interim presumption to Part C claims continued for four years and was resolved in the 1977 amendments to the Act.[17]

In those 1977 amendments, Congress directed the Secretary of Labor to write his own regulations (in two sets) to be applied to reopened and newly filed Part C claims. These amendments specified, however, that in the rules for previously denied and pending claims subject to re-review by the 1977 legislation, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973. 30 U.S.C. §§ 902(f)(2), 945. DOL responded with its interim presumption at 20 C.F.R. § 727.203 (1987). Labor's regulation incorporated the medical criteria of the SSA interim presumption but also mandated consideration of all relevant evidence, and preserved the employer's right to meaningful defenses against claims

15. *See* H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 251-255.

16. *Id.*

17. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) [herein after cited as the 1977 amendments]

by requiring the consideration of scientific and medical evidence.[18]The 1977 amendments also provided for review of previously denied and pending claims under the newly established eligibility criteria.

These decisions did not take place without industry participation or comment. To the contrary, Congress repeatedly considered the effect of its actions on the coal industry and acted to make the program affordable. For example, in the 1977 amendments, Congress excused mine owners from all direct liability arising out of a miner's employment before January 1, 1970. 30 U.S.C. § 932(c). This liability was assigned to the BLDTF. Congress in 1981 transferred additional direct liability from the mining industry to the BLDTF, recognizing the unfairness of imposing additional liability on private defendants for already closed claims. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 205, 95 Stat. 1645 (1981). In 1985, when the Administration proposed to raise the tax paid by coal producers into the BLDTF by fifty percent, Congress refused. It acknowledged that the coal industry was in financial difficulty and should not be saddled with added black lung taxes.[19] Instead, Congress

18. *See* 124 Cong. Rec. S1446 (Feb. 4, 1978) (Debate on Conference Report on the 1977 amendments). Statement of Sen. Javits, conferee and sponsor:

> I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung benefit claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding *not only* of the *presence of black lung disease*, but, also that the claimant's *disability due to the disease* prevents him from performing coal mine work.
>
> * * *
>
> I . . . requested that the statement of managers include language to the effect that "*all relevant medical evidence*" be considered in applying the "interim" standards to the reviewed claims . . . .

[Emphasis added.]

19. 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985) (remarks of Sen. Heinz and Warner). "A significant increase in the black lung excise tax would contribute to the loss of both domestic and international markets for [the] coal industry." 131 Cong. Rec. S15,478 (daily ed. Nov. 14, 1985) (remarks of Sen. Warner). A national accounting and management firm reported in 1985 that the coal industry had slowed to a very modest annual rate of growth and was subject to increased competitive pressure from other fuels. Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report* 3 (Sept. 1985).

enacted a ten percent tax increase and placed a five-year moratorium on interest accrual.[20] Similarly, in 1987, Congress again refused an Administration proposal to increase the tax on producers yet again, and instead, extended the date by which the producers' tax would revert to its lower, 1978 rate.[21]

Congress's actions since the inception of the black lung program in 1969 have consistently recognized the competing policies of compensation to eligible miners, affordability to the industry, and procedural fairness to defendants as well as claimants. Coal industry representatives participated in this legislative debate and subsequent rulemaking.[22] As in all complex issues, a compromise had to be forged. In this case, the liberality of the DOL presumption was balanced by its procedural safeguards and Congress's promise that costs would be affordable. The decisions in *Broyles* and *Sebben* destroy this compromise and are far out of step with Congress's consistent and repeated efforts to protect the coal industry from unanticipated and uncontrolled liability.

II.
APPLICATION OF SSA'S INTERIM PRESUMPTION IN PRIVATELY FUNDED CLAIMS DEPRIVES THE MINE OPERATORS OF DUE PROCESS OF LAW

A. Labor's Interim Presumption Already is Exceedingly Generous to Claimants

Labor's interim presumption achieved the liberality to miners that Congress sought. Armed with its new presumption, Labor

20. Consolidated Omnibus Budget Reconcilation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986).

21. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), amending 26 U.S.C. § 4121(e)(2). None of the requests for additional funding take into consideration the potential impact of these cases.

22. *Problems relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 139 (1981) (statement of Carl E. Bagge, President, NCA).

approved 96,000 claims,[23] well in excess of congressional projections.[24] This presumption is extremely liberal. The BLDTF has paid benefits in claims eighty-four percent of which contained no evidence of disease or related disability. Comptroller General, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 9 (1982). Coal operator defendants been able to successfully avoid such a high percentage of unjustified awards by exercising their right to defend claims.[25] This defense is permitted primarily by DOL's rebuttal provisions which legitimately focus the entitlement inquiry on the basic elements of a compensable claim. Indeed, without the opportunity for rebuttal, Labor's presumption would be unconstitutional. *See Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). Recent opinions by several circuit courts, however, already have substantially eroded rebuttal under Labor's rule.

The Third, Fourth, and Sixth Circuits have held that rebuttal under section 727.203(b)(2) can no longer be established by

23. Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987). From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 and referred to the Secretary of Labor for payment from the BLDTF, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF alone because of the 1977 amendments totals approximately 120,000. *1987 Black Lung Claims Status Report, supra.*

24. H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1977 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. See Lopatto, *the Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund*, 97th Cong. 1st Sess. 23 (Comm. Print 1981).

25. Claims involving BLDTF liability are defended by the Office of Solicitor, Department of Labor only occasionally. As a political and financial matter, they cannot and have not developed these claims to even permit rebuttal where it is possible.

proving the absence of a pulmonary disability.[26] Rebuttal under (b)(2) is no longer available if a miner is disabled for any reason—by a stroke, heart disease, osteoarthritis, or even age. By shifting the focus of (b)(2) rebuttal from pulmonary disability to disability of any origin, these three circuit courts have effectively eliminated subsection (b)(2) as a viable rebuttal method in many cases since most older claimants are disabled to some degree by non-occupational, ordinary diseases of life.

Rebuttal under section 727.203(b)(1)[27] is rarely used because most claimants are no longer working. Rebuttal under subsection (b)(4) is provided if the claimant does not have pneumoconiosis. However, (b)(4) rebuttal is difficult because most claimants can make a case that they have some form of pulmonary or respiratory impairment irrespective of whether that impairment is clinical pneumoconiosis. The definition of pneumoconiosis, 20 C.F.R. § 727.202 (1987), is broader than the "clinical" definition of pneumoconiosis.[28]

Thus rebuttal under section 727.203(b)(3)[29] is the only rebuttal avenue available in most cases. But even the scope of (b)(3) rebuttal is unclear because the circuit courts and the Benefits Review Board have adopted different proof standards.[30]

26. *Kertesz* v. *Crescent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986); *Sykes* v. *Benefits Review Board*, 812 F.2d 890 (4th Cir. 1987); and *York* v. *Director*, 819 F.2d 134 (6th Cir. 1987).

27. Section 727.203(b)(1) provides for rebuttal if the claimant is doing his usual coal mine work or comparable and gainful work.

28. "Clinical" pneumoconiosis is actual coal dust deposition throughout the lungs which results in coal macules around the respiratory bronchioles. "Statutory" pneumoconiosis includes clinical pneumoconiosis but it also ecompasses *any* pulmonary or respiratory impairment significantly related to or substantially aggravated by coal mine employment (*e.g.*, industrial bronchitis). 20 C.F.R. § 727.202 (1987).

29. Rebuttal under section 727.203(b)(3) may be accomplished by proof that a miner's disabiity did not arise in whole or in part out of his coal mine employment.

30. The Third, Fourth and Sixth Circuits all have held that an employer must "rule out" any relationship between a miner's total disability and his occupational exposure to coal dust in order to establish (b)(3) rebuttal. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120 (4th Cir. 1984); *Carozza* v. *U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748

B. Application of SSA's Interim Presumption Means Entitlement Without Giving Industry Its Day in Court

The Fourth Circuit's holding in *Broyles* deals the fatal blow to rebuttal in Part C claims reopened by the 1978 Amendments and obliterates any semblance of due process protection to coal operators. A plainer case of the denial of employer's due process rights through the use of section 410.490 is difficult to imagine. This Court has established a constitutional threshold for statutory presumptions. *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed*, 219 U.S. 35, (1910). The Court has required a "rational connection" between the fact proved and the ultimate fact presumed, *Turnipseed*, 219 U.S. at 43, and has honored a long-standing prohibition against placing defendants in a situation where they cannot rebut a presumption of entitlement to benefits. *Turner-Elkhorn*, 428 U.S. at 35-36. Labor's interim presumption, as interpreted by this Court, protects this basic principle. *Mullins Coal Co.*, 108 S. Ct. 427. SSA's interim presumption does not.

The lack of a "rational connection" between section 410.490 and the medical bases of pneumoconiosis and resulting disability was conceded by SSA when it promulgated those regulations in 1972. The preamble admits that the rule was issued on an interim basis to remove a backlog of claims without waiting for establishment of more facilities to conduct extensive pulmonary testing. 20 C.F.R. § 410.490(a).

When the suggestion of applying section 410.490 to reopened Part C claims appeared during the legislative process culminating

F.2d 1112 (6th Cir. 1984), *cert. denied.*, 471 U.S. 1116 (1985). If a miner is totally disabled from a respiratory standpoint, it is difficult to prove that his occupational exposure has not made *any* contribution, however slight, to his respiratory condition. The Benefits Review Board has modified this standard and held that (b)(3) rebuttal may be established by demonstrating that there is no "significant relationship" between a miner's total disability and his occupational exposure to coal dust. *Borgeson* v. *Kaiser Steel Corp.*, 8 Black Lung Reporter (MB) 1-312 (1985). The "significant relationship" test is a traditional workers' compensation principle, which is consistent with the legislative history of the Act.

in the 1977 amendments, witnesses testified before Congress that the section 410.490 presumption was medically invalid and should not be used to establish liability of operator defendants in reopened or future Part C claims.[31] Two supervisory SSA physicians also testified before Congress in 1977 that the section 410.490 standards were "not based on substantial medical evidence" and, speaking of the ventilatory test values, found invocation values were "entirely normal and would be read by at least 95% of all physicians who were knowledgeable of the values presented as normal values."[32] Numerous studies and reports since 1977 have confirmed the fact that section 410.490 lacks the required rational connection between its presumed facts and the facts proved.[33]

The SSA interim presumption also abrogates the procedural and evidentiary safeguards accorded the employer by the "all relevant evidence" provision in 30 U.S.C. § 923(b) and acknowledged by this Court in *Turner-Elkhorn* and *Mullins*. SSA wrote section 410.490 for use in a non-adversarial setting without the coal industry's participation. If an SSA claim were denied and the claimant requested further proceedings, he appeared before

31. *Black Lung Benefits Provisions of the Federal Coal Mine Health & Safety Act: Hearings Before the House Committee on Education and Labor*, 95th Cong., 1st Sess. 241-242 (1977) [hereinafter cited as 1977 House Hearings] (testimony of Asst. Secretary of Labor Donald Elisberg).

32. 1977 House Hearings at 274-275 (testimony of Dr. Harold I. Passes). *See also Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 193-195 (1977) (testimony of Dr. Herbert Blumenfeld)*.

33. The SSA interim presumption uniformly has been criticized as medically invalid. See Comptroller General of the United States, *Report to the Congress of the United States, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability*, HRD 80-81 (July 28, 1980) (reporting that "in 88.5% of the cases [decided by SSA] medical evidence was not adequate to establish disability or death from black lung." *Id.* at *ii*).A.D. Renzetti, Jr., M.D., *et al., Current Medical Methods in Diagnosing Coal Workers' Pneumoconiosis, and a Review of the Medical and Legal Definitions of Related Impairment and Disability*, prepared for U.S. Dep't of Labor under the auspices of the Franklin Research Center, a Division of the Franklin Institute (1983) (confirming the scientific invalidity of eligibility criteria employed in the black lung program).

an Administrative Law Judge ("ALJ"). SSA was not typically represented by counsel. The ALJ was supposed to make the claimant prove his case, but the proceeding and resulting record often lacked evidence developed by expert defense witnesses or adversary cross-examination of the claimant because there was no true defendant in the SSA cases. This procedural scheme resulted in awards in over 80% of the claims brought under SSA's interim presumption.[34] To now make employers litigate thousands of black lung claims under section 410.490 is neither justified nor equitable nor consistent with Congress's intent.

Rebuttal under SSA's interim presumption does not save the provision from its constitutional infirmities. Once a claimant invokes the presumption (20 C.F.R. § 410.490(b)(1)(i) (1987)), the inquiry switches to rebuttal. Medical evidence has no discernible role in section 410.490 rebuttal. Rebuttal is limited to evidence that the claimant is doing or able to do his usual coal mine or comparable work. 20 C.F.R. § 410.490(c) (1987). In practical terms, these rebuttal provisions are illusory because black lung claimants have typically left the workforce due to age or non-occupational infirmities. Defenses predicated upon obtaining medical proof revealing that the source of the claimant's alleged total disability is not dust exposure or pneumoconiosis—cigarette smoking being the most prevalent alternative[35]

34. SSA approved over 500,000 claims by 1978, representing over 81% of the claims filed. Letter from Secretary of HEW Joseph A. Califano, Jr., to Rep. Carl Perkins (Nov. 3, 1978); Staff of Subcomm. on Oversight, House Comm. on Ways and Means, 97th Cong. 1st Sess., *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 16 (Comm. Print) (1981) (citing U.S. Dep't of Labor and U.S. Dep't of Health and Human Services statistics).

35. A prominent pulmonary physician and scientist, Dr. Keith Morgan (former Director, Appalachian Laboratory for Occupational Respiratory Disease, HEW) reported to Congress in 1977 that: "The U.S. Public Health Service studies indicate that cigarette smoking is between 5 and 10 times as important as dust exposure in producing impairment of ventilatory capacity," *quoted in*, H. Rep. No. 151, 95th Cong., 1st Sess. 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News 293. In May 1982, the Ad Hoc Working Group of the American Thoracic Society issued a very strong statement in favor of increased reliance on x-rays in diagnosing pneumoconiosis and calling for recognition by the DOL that cigarette smoking is usually the dominant factor for respiratory

—or proving low levels of dust exposure, do not fit into the SSA rebuttal scheme and therefore are futile. *Yet, these are the very defenses contemplated as protections against benefit awards to miners without evidence of disabling coal workers' pneumoconiosis. Turner-Elkhorn*, 428 U.S. at 34; *Mullins*, 108 S. Ct. at 427. Under the SSA interim presumption, invocation is tantamount to entitlement.

For these reasons, application of 20 C.F.R. § 410.490 to mine operators cannot be constitutionally sanctioned.

III.
PRINCIPLES OF FINALITY IN ADVERSARY LITIGATION CANNOT BE DISREGARDED

Firmly established jurisdictional principles are violated by *Sebben*. Reawakening tens of thousands of long closed and finally denied claims offends the strict time limitations specified in the Longshore Act. 33 U.S.C. § 921(a)-(c), incorporated into 30 U.S.C. § 932(a). Res judicata also precludes relitigation of these black lung claims. In addition, issuance of a writ of mandamus by the district court breaches the Longshore Act's limitation on district court jurisdiction. 33 U.S.C. § 921(a)-(d). These principles of finality and exhaustion are basic to our system of jurisprudence. In the context of this litigation, they must be respected to ensure some measure of predictability for an industry already plagued by unpredictable costs and expenses. *Sebben* assures that the cost to the coal industry will be uncontrollable and the result unfair.

The BLDTF is already insolvent with the industry paying 110% more in taxes than expected. Even before the Eighth and Fourth Circuits' decisions, the ability of the BLDTF to achieve solvency by 1996 was dubious.[36] With *Sebben*, the BLDTF's

abnormalities in coal miners, *reprinted in* 128 Cong. Rec. E1979 (daily ed. May 4, 1982) (extension of remarks by Rep. Erlenborn)

36. Prior to the moratorium on interest accrual enacted in 1986, DOL had predicted that advances and interest necessary to meet BLDTF obligations after the 1978 amendments could reach *$30 billion* by the year 2010. H.R. Rep. No.

financial difficulties will be stretched well beyond the coal industry's ability to respond. Reserves for claim awards, expert witness and litigation costs based on Labor's interim presumption are rendered useless by emergence of a new set of adjudicatory rules imposed by judicial fiat ten years after the enactment of the 1977 amendments. The domestic coal industry currently is under tremendous threat from pressing financial pressures resulting from rising costs and depressed prices, regulatory costs, and imported energy.[37] The huge sums that the BLDTF would be forced to pay to meet the increased liabilities stemming from *Broyles* and *Sebben* inevitably will prompt calls for another increase in the producers' tonnage tax to curb the runaway BLDTF deficit. Another black lung tax increase either must be absorbed by coal producers or passed along to consumers. This presents a Hobson's choice to the industry. Absorbing the cost of a tax increase may eliminate some operators' ability to survive; raising prices even in long-term utility-supply contracts, the life blood of the coal industry,[38] would prompt the move toward electric utilities' purchase of foreign electricity or diversion of resources from coal-fired plants to facilities that use fuel other than domestic coal.[39] Congress and the Executive branch have reaffirmed the imperative role of a healthy domestic coal industry both in United States energy policy and for national security.[40] This policy would be

241, 99th Cong., 2d Sess., pt. 1, at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-654.

37. *Hearing on the United States-Canada Free Trade Agreement before the Subcommittee on Mining and Natural Resources, House Comm. on Interior and Insular Affairs*, 100th Cong., 2d Sess. (March 10, 1988) (Statement of James M. Friedman).

38. Park et al., "Coal Supply Contracts," 4 *Coal Law and Regulation* §84 (1987).

39. *See generally*, John S. Herrington, Secretary, United States Dep't of Energy, *Energy Security, A Report to the President of the United States* 162-180 (Mar. 1987) [hereinafter cited as Energy Security Report].

40. *See* Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631 § 2 (1970), 84 Stat. 1876, 30 U.S.C. § 21(a): "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound

seriously undercut if the *Sebben* holding is permitted to make massive, costly *changes in the black* lung program.

The Longshore Act's procedures are comprehensive, complete and exclusive. 33 U.S.C. § 921. There is simply no authority for the Eighth Circuit's ruling under the Longshore Act. Similarly, res judicata is mandatory. "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). And the mandamus statute, 28 U.S.C. § 1361, is inapplicable here, because the district court lacks jurisdiction to invoke it. The *Sebben* decision ignores all this.

Instead, *Sebben* orders the revival of old, closed claims.[41] And the decision virtually guarantees awards, given the problems of proof in these stale claims, the limited resources and limited mission of the Department of Labor to defend such claims and the lack of any avenues of rebuttal by medical evidence even if the claims were defended. At the same time, such a precedent invites every denied workers' compensation claimant to proceed outside

and stable domestic mining . . . industries." Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201(a): "coal mining operations presently contribute to the nation's energy requirements . . . ." *See also* Energy Security Report *supra* note 39.

41. Employers have never received notice of the existence of many of these claims. As explained in *U.S. Pipe and Foundry Co.* v. *Webb*, 595 F.2d 264, 271-274 (5th Cir. 1979), the DOL's applicable regulations (20 C.F.R. § 725.151 (1978); 20 C.F.R. § 725.412 (1987)), the DOL does not normally give notice to a potential responsible coal operator defendant of a claim unless: (a) the claim is administratively approved; or (b) after a claimant in a denied claim requests a hearing. Thus, in thousands of cases in the *Sebben* class in which claimant did not appeal denials under the 20 C.F.R. Part 727 (1987) eligibility standards, re-opening will prompt notice to employer *for the first time* that he must defend a particular black lung claim. By the terms of the 1977 amendments, all of the *Sebben* class members filed between December 20, 1969, and April 1, 1980. *Sebben*, if undisturbed by this Court, will require the defense of claims that are a minimum of *nine* years old and could be almost twenty years old. The opportunity to obtain an expert medical examination will concurrently be nine or more years stale, and the aging process or intervening death of the claimant will thwart any bona fide defense effort.

the prescribed statutory scheme for adjudication of claims. *Sebben* requires the courts to keep its doors open indefinitely to any black lung claimant dissatisfied with an administrative agency's action at the expense of the coal industry. The resulting unfairness to the industry is manifest.

CONCLUSION

The decisions below in *Sebben* and *Broyles* are wrong for the reasons set forth in Petitioners' Brief and would impose substantial unwarranted burdens on the coal industry. Therefore, the judgments of the Fourth and Eighth Circuits should be reversed.

Respectfully submitted,

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